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IN THE

Supreme Court of the United States

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, NEW YORK CITY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN, WESTCHESTER COUNTY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN, on behalf of themselves, their members, and all others similarly situated, and CLARICE SEEGARS, BERNADETTE THOMAS, DELLIE BRITT, and JANE DOE, as Administratrix, on behalf of themselves, and all others similarly situated,

Petitioners,

v.

GEORGE W. PATAKI, individually and as Governor of the State of New York, MARIO CUOMO, EDWARD MERCADO, individually and as Commissioner of the Division of Human Rights of the Executive Department of New York State, and MARGARITA ROSA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is a Fourteenth Amendment due process case that raises the question of whether thousands of persons seeking redress for unlawful discrimination through a State administrative agency can pursue relief in a federal court action if they have been subjected, by government inaction, to unreasonable prejudicial delay in obtaining a hearing on the merits of their claims.

A panel of the United States Court of Appeals for the Second Circuit reversed the decision of the United States District Court for the Southern District of New York, which held that Petitioners, and the thousands of class members they represent, had been denied their Fourteenth Amendment procedural due process rights as a result of: (a) protracted prejudicial delays in processing their discrimination claims at the New York State Division of Human Rights ("Division"); and (b) inadequate notice prior to the Division's administrative convenience dismissal ("ACD") of their claims. The Second Circuit concluded that no constitutional violation had been shown. Despite the district court's finding of fact that they could not effectively prosecute their administrative discrimination complaints due to unreasonable prejudicial delays, the Court of Appeals ruled that Petitioners were not deprived of a property interest. That ruling has relegated to the dustbin of history the long-standing precedent that due process requires a hearing "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), that is, before a person is deprived of a property interest. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972).

The questions presented are:

1. Must a party whose property interests are at substantial risk of an erroneous deprivation by state government action first exhaust state procedures, where such efforts would be futile, before seeking recourse under 42 U.S.C. § 1983?

2. Is a showing that a written state administrative procedure is not complied with on a systemic basis sufficient for an organization to challenge systemic non-compliance through a section 1983 action?

3. Does a state administrative discrimination cause of action have to be finally destroyed before a person can seek redress under section 1983, or is it sufficient that the contested state action has substantially increased the risk of an erroneous determination because the complainant can no longer prosecute the claim effectively due to the prejudicial effects of unreasonable delay in providing a hearing on the merits?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS PURSUANT TO RULE 29.6

Petitioner New York State National Organization for Women states that it is a New York State not-for-profit corporation and that there is no publicly held stock.

Petitioners New York City National Organization for Women and Westchester County National Organization for Women state they are unincorporated membership organizations that are duly chartered chapters of the New York State National Organization for Women.

Petitioners Clarice Seegars, Bernadette Thomas, Dellie Britt, and Jane Doe (as Administratrix) are individuals who had discrimination complaints pending at the New York State Division of Human Rights.

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Petitioners New York State, New York City, and Westchester County Chapters of the National Organization For Women (collectively "NOW"), and Clarice Seegars, Bernadette Thomas, Dellie Britt and Jane Doe (as Administratrix) ("Petitioners"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit ("Second Circuit") entered in this proceeding on July 23, 2001.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ("Pet. App.") 1a-45a) is officially reported at 261 F.3d 156 (2d Cir. 2001). Other reported decisions in this case, also included in the Appendix, are as follows: *New York State National Organization for Women v. Pataki*, 189 F.R.D. 286 (S.D.N.Y. 1999) ("*NOW III*") (Pet. App. 46a-112a); *New York State National Organization for Women v. Cuomo*, 14 F. Supp. 2d 424 (S.D.N.Y. 1998) ("*NOW II*") (Pet. App. 113a-142a);[1] and *New York State National Organization for Women v. Cuomo*, 182 F.R.D. 30 (S.D.N.Y. 1998) ("*NOW I*") (Pet. App. 148a-177a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 23, 2001, and Petitioners' timely petition to the Second Circuit for Rehearing and Suggestion for Rehearing En Banc was denied by order dated September 10, 2001 (Pet. App. 178a-179a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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1. *NOW II* was clarified in an unreported September 2, 1998 Endorsement, which has been included in Pet. App. at 143a-147a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution, 42 U.S.C. § 1983, New York Civil Procedure Law and Rules Art. 78, New York Executive Law § 290 *et seq.*, and New York Code of Rules and Regulations, Title 9, § 465 *et seq.*, are reproduced in the Appendix, at Pet. App. 180a-186a.

STATEMENT OF THE CASE

Summary

NOW and the four individual Petitioners brought this § 1983 action to obtain redress on behalf of themselves and a class of persons similarly situated who exercised their right to file administrative discrimination complaints, and who were subjected to unreasonable and prejudicial delays by the agency charged with promptly processing and adjudicating those claims.

In the 1990 to 1998 period, more than 43,000 individuals who had filed discrimination claims with the New York State Division of Human Rights had their cases dismissed or determined by the Division. Pet. App. 6a, 60a. However, the Division's case processing backlog was so extensive that, for those thousands of claims where the agency determined that the complaints had sufficient merit to warrant hearings, the mean time for the Division to finally resolve those claims was more than seven years. *Id.* 61a. Those complainants, like the individual Petitioners and the complainant witnesses who testified at trial, were at substantial risk of losing their cause of action, or of obtaining an erroneous government determination, because their ability to effectively prosecute their claims was compromised by the unreasonable delay. That delay resulted in the unavailability of witnesses, lost documents, and fading memory. *Id.* 65a-74a, 76a. Additionally, some complainant-class members died while their claims were long delayed at the Division. *Id.* 72a, 74a, 93a.

State law does not provide a meaningful mechanism for complainants to expedite the Division's hearing process. Further, the agency's regulations do not provide a meaningful opportunity to obtain and to preserve witness testimony and documents during these years of delay. Petitioners' only means of protecting their administrative causes of action is through a § 1983 action in federal court, but the Second Circuit has denied them access to the federal courts.

Facts and Prior Proceedings

The New York State Legislature established the New York State Division of Human Rights as a law enforcement agency, and charged it with the obligation to process discrimination complaints promptly. The Legislature considered "promptly" to mean finally determining those complaints within one year and three months of the date of filing. *See* Pet. App. 135a, 181a; N.Y. Executive Law § 297 ("Exec. L. __") (McKinney's 2001). However, the Division has a long history of substantial backlogs and unreasonable delays in processing discrimination complaints. *Id.* 131a-132a. From October 15, 1990 to April 10, 1998, in those cases where the Division found probable cause ("PC") to believe that respondents had engaged in unlawful discriminatory conduct, the mean number of days from filing to final determination was 2,701, that is, nearly 89 months, or more than seven years.[2] Pet. App. 61a. That time period was

2. In contrast, a U.S. Department of Justice Special Report, which analyzed statistical data on civil rights complaints in the United States District Courts, reveals that the median time from filing to trial verdict in employment cases dropped from 20 months in 1990 to 18 months in 1998, and the median time for processing housing cases was 16 months. *See* U.S. Department of Justice Special Report, Civil Rights Complaints in U.S. District Courts, 1990-98 (January 2000) at 11, http://www.ojp.usdoj.gov/bjs/ abstract/crcusdc.htm. Similarly, a U.S. Department of Justice Bulletin, in which statistical data from the Nation's largest 75 counties was surveyed, shows that, for employment discrimination bench trials, the median and mean time, from date of (Cont'd)

substantially longer for numerous other complainants. *Id.* 60a. For example, Petitioner Dellie Britt's complaint had languished at the Division for thirteen years, without a hearing even being scheduled. *Id.* 50a, 67a-68a.

The district court found that the Division's unreasonable delay resulted in actual prejudice because complainants' ability to prosecute their discrimination claims had been compromised due to the death of complainants, and the unavailability of witnesses. Pet. App. 92a-93a. The district court also found that thousands of other complainants had their cases dismissed, for the convenience of the Division (*id.* 61a), without adequate pre-deprivation notice. *Id.* 94a-96a.

The New York State Human Rights Law

In enacting the New York State Human Rights Law ("HRL"), the Legislature established an administrative cause of action for persons claiming to be aggrieved by unlawful discriminatory practices. Exec. L. §§ 290 *et seq.* It created the Division to, among other things, "eliminate and prevent discrimination," Exec. L. § 290.3 (Pet. App. 181a), and empowered it to take, investigate, prosecute, hear, and adjudicate complaints of discrimination in a timely manner. Exec. L. § 297 *et seq.*

Once a complaint has been filed with the Division, it is required to "promptly" serve a copy on the respondent and to make a "prompt investigation" of the allegations in the complaint. Exec. L. § 297.2.a, Pet. App. 181a. Within 180 days (100 days in housing cases) after filing of a complaint, the Division must determine whether there is "probable cause" to believe discrimination has occurred. Exec. L. § 297.2.b. If probable cause is found, the Division must issue, within 270 days after the filing of the complaint, a notice requiring the

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(Cont'd)
filing to judgment, were 17.3 months and 22.3 months, respectively, *See* "Contract Trials and Verdicts in Large Counties, 1996" (April 2000) at 7 (Table 8), http://www.ojp.usdoj.gov/bjs/abstract/ctvlc96.htm.

respondent to answer the complaint, and schedule a public hearing. Exec. L. § 297.4.a, Pet. App. 181a. If a probable cause finding is made, the complaint will be prosecuted by an attorney from the Division. Exec. L. § 297.4.a. Within 180 days after the commencement of the hearing, a determination must be made and an order issued. Exec. L. § 297.4.c, Pet. App. 181a.

Although the State courts have determined that the complaint processing statutory time periods are directory rather than mandatory (Pet. App. 6a), the Division's own training materials instruct investigators to handle cases promptly because, as complaints age, "events and actions may no longer be fresh, and because records and witnesses may no longer be available." Lodging (separately bound) ("L-__") at L-2. *See also Manual for Hearing Officers in Administrative Adjudication*, Rev. Manual No. 16, New York State Civil Service Commission 29 (1972) ("Unreasonable delays affect the availability of witnesses, the memory of parties and witnesses and the marshalling of evidence. Delays may result in a denial of justice.").

The HRL and agency regulations also authorize the Division to dismiss claims for its administrative convenience because, among other things, the Division determined that the complainant had failed to cooperate with the agency in the investigatory or hearing process. Exec. L. § 297.3.c; 9 NYCRR § 465.5(e)(2)(ii).

The Decisions Below

The district court rendered three reported decisions in the case. Although only *NOW II* and *NOW III* were the subject of the Second Circuit's ruling, the decision in *NOW I* (Pet. App. 148a-177a) is instructive because the district court's finding shows that the Division was quite prepared to deprive aggrieved persons of their right to file discrimination complaints in order to reduce the agency's 1993-1994 17,000 case backlog. Pet. App. 171a-177a; *see also* L-7-L-8. In granting a preliminary injunction barring the Division from continuing to implement

new restrictive complaint intake rules, the district court concluded that "[a]mple evidence in the record suggests that New York's government, in its rush to cleanse the Division's backlog of cases and prevent wasteful investigations, has instituted ambiguous policies that are erratically applied and that unduly risk erroneous determinations in the intake process." Pet App. 171a. The district court specifically found that "SDHR's complaint intake policy arbitrarily prevents aggrieved individuals from filing discrimination complaints with SDHR." *Id.* 176a. *See also NOW III*, Pet. App. 103a-107a (permanently enjoining use of restrictive intake rules).[3]

In *NOW II* (Pet. App. 113a-142a), the district court granted in part, and denied in part, respondents' qualified immunity motion. *Id.* 141a-142a. Here, the district court found that it was well-settled that inordinate prejudicial governmental delay in providing an administrative hearing, involving a property interest, could rise to the level of a due process violation. Pet. App. 127a-129a. After surveying this Court's decisions regarding protracted delay in obtaining a hearing (*id.* 127a-129a), considering the extent of the delay at the Division, and applying the *Mathews v. Eldridge*, 424 U.S. 319 (1976) standards (*id.* 129a-137a), the district court found that the Division's "delays in resolving and ultimate dismissal of thousands of complaints represent opportunities lost for thousands of citizens to pursue their substantive rights under the Human Rights Law." *Id.* 134a.

The third decision, *NOW III*, was rendered after a full trial in which individual Petitioners and other complainant witnesses testified as to how they were prejudiced by the unreasonable length of the Division's delays. *Id.* 65a-74a, 76a. That testimony showed that the Division's case processing delays compromised their ability to effectively prosecute their claims because they could not locate witnesses, documents were unavailable, and memories had faded. *Id.* Moreover, some of the complainants,

3. Respondents did not appeal either *NOW I* or that part of *NOW III* enjoining the use of the restrictive intake rules.

such as John Doe and Carol Mandros, died while their cases were pending (*id.* 72a, 74a, 93a), and others, like Henri McNulty and Michael Campbell, had life threatening medical conditions which put them at risk of dying before their cases could be heard. *Id.* 67a, 73a. The pervasive nature of the harm testified to by the witnesses was supported by Petitioners' expert witnesses, statistical evidence, and the Division's own documents and statistical data. *Id.* 60a-63a, 65a, 74a-77a; *see also* 131a, 134a, L-2, L-8.

Additionally, the district court reviewed the Division's procedures for dismissing complaints for its convenience and considered examples of the pre-deprivation notices sent to complainants who were at risk of an ACD determination. *Id.* 94a-96a. It determined that those procedures and notices were constitutionally inadequate. *Id.* 96a. The district court specifically found that the post-1991 pre-deprivation notices failed "to inform complainants that they were required to contact [the] Division in order to continue their cases, and it did not inform complainants of their right to contest an ACD determination." *Id.* It further pointed out "that prior to 1991, before the Division was under pressure to reduce its backlog of cases, the Division informed complainants of impending ACD determinations in a much clearer letter." *Id.*

Although the Division's complainant contact policy required the Division to follow each component of its contact procedures before making an ACD determination (Pet. App. 95a), the Division's failure to comply with those procedures was so extensive that it did not follow one or more of them in 74.4% of the cases it dismissed for its own administrative convenience. L-6. *See also* L-3–L-4

The Second Circuit dismissed Petitioners' due process claims, and vacated the district court's declaratory and injunctive relief. *Id.* 30a. While the Second Circuit agreed that the Division's case processing delays were unreasonable, it found that there was no constitutional deprivation because the State

provided pre-deprivation procedures which would suffice to protect Petitioners' ability to effectively prosecute their discrimination claims. *Id.* 19a-23a. Specifically, the Second Circuit ruled that a State court mandamus proceeding was adequate to compel timely hearings (*id.* 20a-22a), and the Division's rules of practice provided mechanisms for insuring the preservation of evidence (*id.* 16a-17a). Additionally, without ruling on the adequacy of the Division's pre-deprivation notices, the Second Circuit found that the State's written notice policy was sufficient to demonstrate that the agency might have cured any inadequacy found in the agency's pre-deprivation notices. *Id.* 29a-30a. Thus, there was no constitutional deprivation.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has incorrectly decided a question of considerable importance to thousands of persons who attempt to utilize Congress' carefully crafted federal/state anti-discrimination scheme by seeking state administrative redress for unlawful discriminatory conduct. *See New York Gaslight Club. Inc. v. Carey*, 447 U.S. 54, 66 (1980) (it was "Congress' plan that federal policies be vindicated at the state or local level"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101-02 (1983) ("state fair employment laws [are important] to the federal enforcement scheme"). Its decision is contrary to this Court's precedent because it requires such persons to exhaust futile State procedures before being able to access the federal courts to pursue relief from unreasonable prejudicial delay by means of a § 1983 action.

The real consequence of the Second Circuit's decision will be that those thousands of discrimination complainants whose cases are just languishing at the Division will abandon the State administrative process and turn to the federal courts for relief. There is no incentive, and no sound reason, for complainants to engage in additional and costly State litigation just to compel the Division to schedule a hearing on the merits.

If complainants must undertake court litigation to pursue their claims, they are far more likely to do so in federal court, rather than engage in a State court battle with the very agency that is supposed to be providing prompt redress for their claims. It simply defies common sense to establish an exhaustion requirement that would require complainants to engage in legal proceedings against both the alleged discriminator and the Division, just to get a timely hearing on the merits of their claims. Such a scheme would certainly thwart Congress' intent that complainants be encouraged to utilize state administrative procedures for redress. As this Court pointed out in *New York Gaslight Club. Inc.*, 447 U.S. at 66 n.6: "The existence of an incentive to get into federal court, such as the availability of a fee award, would ensure that almost all Title VII complainants would abandon state proceedings as soon as possible. This, however, would undermine Congress' intent to encourage full use of state remedies."

I. EXHAUSTION OR PURSUING A FUTILE STATE ACTION IS NOT REQUIRED AS A PREDICATE TO FILING A SECTION 1983 DUE PROCESS CLAIM

The essence of the Second Circuit's decision is the conclusion that:

> Without excusing New York's gross bureaucratic delays, the fact remains that plaintiffs are generally the masters of their legal actions. As such, they bear the responsibility for preventing actual prejudice to their claims by investigating, memorializing testimony from potentially forgetful or absent witnesses, and preserving documents.

Pet. App. 16a. However, once individuals file administrative discrimination complaints at the Division, they are no longer the "masters of their legal actions," *id.* Rather, they have lost control of the investigation of their claims and have become the victims of a bureaucratic system that, while mandated to

provide timely redress for unlawful discrimination, offers only years of inaction. Neither that system nor the State courts provide a meaningful procedure to protect complainants from the prejudicial effects of the Division's egregious delays.

The Second Circuit agreed that a discrimination cause of action is a property interest. *See id.* 10a. However, it found that Petitioners were not subjected to a due process violation because the State provided adequate pre-deprivation procedures. *Id.* 20a-23a. According to the Second Circuit, Petitioners could have brought an Article 78 (N.Y. C.P.L.R. 7801-06) (McKinney's 2001) proceeding to mandamus the Division to process their individual complaints before they were unduly prejudiced. *Id.* The Second Circuit further found that the Division's regulations provided adequate safeguards for preserving evidence during the years of delay before the complaint could be heard on the merits.[4] *Id.* 16a-18a. Thus, the Second Circuit held that, because Petitioners had failed to exhaust these pre-deprivation procedures, the State had not deprived them of due process. *Id.* 22a.

The Second Circuit's rationale directly contravenes this Court's holding in *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), because the Second Circuit has raised an impermissible barrier to access to the federal courts. Under the Second Circuit's reasoning, Petitioners were required to exhaust clearly futile efforts to obtain a state remedy before they could seek relief through a § 1983 action. Neither the Constitution nor any relevant Congressional enactment requires that a person make a futile effort to exhaust all state avenues of redress before making a § 1983 claim. To the contrary, *Patsy*, which cites to numerous prior cases and the legislative history of § 1983, firmly held that the federal courts were the guardians of federal rights, and that access to the federal courts could not

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4. Neither of these dispositive findings was briefed by the parties during the consolidated appeals, nor were these issues raised by the panel during more than 75 minutes of oral argument.

be denied because a plaintiff did not exhaust state remedies. 457 U.S. at 500-507, 516.

Even if some type of exhaustion were required in this case, the remedial avenues set forth by the Second Circuit were so inadequate and conjectural that it would have been futile to pursue them. In *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), this Court restated the fundamental principle that "[t]he law does not require the doing of a futile act." Thus, "[w]here exhaustion would be futile or inadequate," even the administrative process may be bypassed. *Honig v. Doe*, 484 U.S. 305, 327 (1988). Indeed, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the core case relied upon by Petitioners, this Court did not require that Logan pursue a state remedy that might have provided full relief because it was speculative that the state court would entertain that action. 455 U.S. at 435 n.9.

A. New York State Law Does Not Permit A Court to Mandamus Government Officials to Perform Discretionary Acts

The Second Circuit found that, under New York State law, a person subjected to inordinate delays in obtaining a hearing could seek a writ of mandamus in State court to compel the Division to schedule a hearing more quickly. Pet. App. 20a-23a. However, any such effort would be futile.

A proceeding to compel an act by a state official can only succeed if the official has a non-discretionary duty to perform an act required to be performed by law. Thus, for example, in *Logan*, 455 U.S. at 425-8, agency officials had a non-discretionary duty to conduct a fact-finding conference on a discrimination complaint within 120 days of the filing of a complaint. If that mandatory requirement existed in New York, and the Division would not hold the conference within the required time period, a mandamus action would lie to compel the Division to hold the hearing within the statutory time period — and Petitioners could not argue that they had no meaningful State process to remedy the Division's inordinate

delay before being prejudiced. However, the New York Court of Appeals has held that the New York HRL time periods are directory, not mandatory. *Sarkisian Bros., Inc. v. State Division of Human Rights*, 48 N.Y.2d 816, 817-18 (1979). *See also* Pet. App. 6a. Thus, there is no time period within which the Division is required to act on a discrimination complaint.

A writ of mandamus is an extraordinary remedy which is available only to compel acts by government officials that are non-discretionary and mandated by law. *Klostermann v. Cuomo*, 61 N.Y.2d 525, 537 (1984). "Traditionally, '[m]andamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought.' " *Id.* at 539, quoting *Matter of Legal Aid Soc. v. Scheinman*, 53 N.Y.2d 12, 16 (1981). Conversely, mandamus is not available where the act sought to be compelled involves the exercise of judgment or discretion. *Matter of Garrison Protective Svcs., Inc. v. Office of the Comptroller of the City of New York*, 92 N.Y.2d 732, 736 (1999). Since the time periods set forth in the HRL are not mandatory, there is no clearly established non-discretionary right to be enforced.

Moreover, in order to grant a mandamus to compel a hearing, a State court would have to substitute its judgment for the judgment of Division officials. In particular, the court would have to decide when, and under what circumstances, a complainant should be granted mandamus relief — when to do so forces another equally delayed case backward in the queue. This necessarily involves the balancing of competing interests, and "[mandamus] will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion." *Matter of Crain Communications, Inc. v. Hughes*, 74 N.Y.2d 626, 628 (1989) (internal quotation marks and citations omitted).[5]

5. *Orange Lake Assocs. v. Kirkpatrick*, 21 F.3d 1214 (2d Cir. 1994), and *Tall Trees Constr. Corp. v. Zoning Bd. Of Appeals*, 717 N.Y.S.2d 369 (App. Div. 2d Dept. 2000), which were cited as authority by the (Cont'd)

In light of the foregoing considerations, it is not surprising that, although the Division's notorious case processing delay problem has been the subject of State court commentary for nearly three decades,[6] the State courts have not compelled the Division to schedule hearings on the merits because of the agency's case processing delays. This Court, in an analogous exhaustion situation, noted that where a state remedy was conjectural, and where there were no state court decisions actually granting the remedy sought, petitioners were not required to pursue "alternatives as a prerequisite to taking their claims to federal court." *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).

The futility of pursuing a state court remedy is evident for other reasons as well. Before complainants can seek redress in State court, they are required to raise the issue, at the hearing on the merits of the discrimination claim, that it was the Division's delay which caused them substantial prejudice in effectively prosecuting their claim. *See Housing Opportunities Made Equal v. Pataki*, 716 N.Y.S.2d 215, 216 (App. Div. 4th Dept. 2000) ("whether any prejudice to plaintiffs resulted from the Division's delay in hearing their complaints must first be determined during the course of the administrative proceeding; 'a court may not

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(Cont'd)
Second Circuit for the proposition that mandamus is available (Pet. App. 21a-22a), do not alter any of the foregoing since neither case involved a pre-hearing mandamus action. Rather, both cases involved Article 78 proceedings in the nature of certiorari to review and annul determinations after hearings.

6. *See, e.g., State Div. of Human Rights v. Rinas*, 348 N.Y.S.2d 422, 424 (App. Div. 4th Dept. 1973) ("the delays in processing the complaint herein were unconscionable and so flagrant as to be prejudicial in law to the respondents"); *Diaz Chemical Corp. v. State Div. of Human Rights*, 91 N.Y.2d 932, 934 (Ct. of App. 1998) (Bellacosa, J., concurring) ("[I]t should not be overlooked that [the Division's] inordinate delays are truly harming people, their rights, and the administrative adjudicatory process."). *See also* Judge Bellacosa's concurrence in *Louis Harris and Assocs., Inc. v. deLeon*, 84 N.Y.2d 698, 706-08 (Ct. of App. 1994).

intervene in an administrative proceeding, for reason of adjudicatory delay, until a hearing has been held and an official order rendered.' ") (quoting *Cortlandt Nursing Home v. Axelrod*, 495 N.Y.S.2d 927, 934 (Ct. of App. 1985), *rearg. denied*, 499 N.Y.S.2d 1030, *cert. denied*, 476 U.S. 1115 (1986)).[7] Thus, Petitioners are required to first make their claim that they were prejudiced by the agency's unreasonable delays to the very officials who were responsible for the delays. In *Felder v. Casey*, 487 U.S. 131, 149 (1988), this Court found that a state exhaustion requirement that "forces injured persons to seek satisfaction from those alleged to have caused the injury in the first place" is inconsistent with the remedial purposes of § 1983.

Moreover, the futility of such an exercise is manifest by the fact that the Division is without power to grant any meaningful relief to complainants who have already lost the ability to effectively prosecute their claims. The agency certainly could not make a finding of discrimination, and award relief against an employer, just because the Division's delays

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7. In *Housing Opportunities Made Equal*, 716 N.Y.S.2d at 216, the Appellate Division, relying on *Cortlandt Nursing Home*, 495 N.Y.S.2d at 934, opined that state courts could grant a mandamus to compel a hearing. However, its reliance upon *Cortlandt Nursing Home* is misplaced, since the hearing in that case was not compelled as a result of unreasonable delay. Although the issue of undue delay was extensively discussed by the New York Court of Appeals, the hearing was ordered because petitioners had brought an Article 78 to prevent respondents from effectuating recoupment of Medicaid reimbursements without affording the facility a hearing in accordance with the state's rules and regulations. 495 N.Y.S.2d at 930-1. The court treated the proceeding as one "in the nature of mandamus to compel the Department to conduct a hearing *in accordance with governing regulations*." 495 N.Y.S.2d at 936 (citations omitted) (emphasis added). Since the nursing facility had requested a hearing, and the regulations entitled the facility to a hearing when requested, the State could be compelled to hold that hearing before it could recoup overpayments made to the facility. This is a classic case where mandamus is appropriate, since the State officials had a non-discretionary duty, mandated by law, to hold a hearing before the agency could recover funds allegedly overpaid to the health care facility.

prejudiced the complainant. And, the Division is clearly without authority to grant monetary relief against either the State or individual officials for the injury caused by the Division's delays. In *Bowen v. City of New York*, 476 U.S. 467, 485 (1986), this Court held that exhaustion was "futile" and "there was nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise," when the agency could not grant the relief sought by the plaintiff.

Similarly, no meaningful relief can be granted by a State court. If a complainant can demonstrate substantial prejudice because of the Division's years of delay in commencing the hearing, it means that the complainant's ability to effectively prosecute the discrimination claim has already been compromised. Needless to say, where substantial prejudice to prosecuting the complaint has already been shown in the court proceeding, it would be a futile and wasteful exercise for the State court to then compel the Division to schedule a hearing on the merits of that complaint. *Cf. Weinberger v. Salfi*, 422 U.S. 749, 767 (1975) (no need to proceed with a hearing where it would be "futile and wasteful.").

Petitioners have only one viable avenue of redress in this case, to wit, a § 1983 action. In order to protect Petitioners' due process rights, it is essential that the federal court provide redress where State officials fail to provide hearings before Petitioners have lost the ability to effectively prosecute their complaints. As this Court explained in *Fuentes v. Shevin*:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This court has not

> . . . embraced the general proposition that a wrong may be done if it can be undone."

407 U.S. at 81-82 (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1972)). This is the very essence of having a hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. at 552.

B. The Division's Rules Do Not Provide A Meaningful Procedure to Obtain or Preserve Evidence

The Second Circuit found that the Division's rules of practice afford complainants "sufficient means to prevent — well before any period of delay that *might* be considered constitutionally suspect — the types of prejudice the district court identified as actionable (i.e., loss of documentary evidence and loss of key witnesses)." Pet. App. 16a-17a (emphasis in original). Unfortunately, the Second Circuit's understanding of the application of the limited subpoena power authorized under the rules, and the usefulness of the Division's evidentiary rules, is patently incorrect.

The Second Circuit specifically held that the Division's evidentiary rules allowed the parties to preserve evidence by engaging an attorney and by applying to the Division to subpoena parties and witnesses for depositions and document production. Pet. App. 17a-18a. However, the express terms of the Division's regulations actually preclude complainants from obtaining, and their attorneys from issuing, subpoenas to discover and preserve evidence at a sufficiently early time in the process to avoid undue prejudice from the agency's delays. *See infra.* The Second Circuit further held that the relaxed nature of the Division's evidentiary rules prevented claimants from being prejudiced by the delay due to absent witnesses since the rules allowed claimants to introduce "subpoenaed materials in lieu of live testimony, thus ameliorating prejudice a claimant might otherwise experience due to absent witnesses." *Id.* Although the Division's evidentiary rules are very liberal, they cannot be utilized in the manner set forth by the Second Circuit since, to do so, would violate clearly

established State law and deprive the opposing party of the fundamental due process right of cross examination. Thus, any effort to use subpoenas to obtain or preserve evidence, or to utilize the liberal evidentiary rules as a means of compensating for the testimony of unavailable witnesses, would also be a futile and wasteful effort. *Cf. Weinberger v. Salfi*, 422 U.S. at 767.

Witness subpoenas cannot be used to preserve testimony for later presentment at a hearing, since those subpoenas are returnable *only* at the actual public hearing. *See* 9 NYCRR § 465.14(b), Pet. App. 185a-186a. Consequently, witness subpoenas are useless during the years the complaint is being investigated and awaiting a hearing. Further, pre-hearing depositions are not possible at the Division, since depositions can only be authorized by the Administrative Law Judge ("ALJ") during the actual hearing on the merits, and, then, only after the ALJ concludes that affidavits or other forms of proof are inadequate. *See* 9 NYCRR § 465.12(e)(12), Pet. App. 183a-184a. In any event, the ability of a complainant's attorney to issue subpoenas, or to obtain Division subpoenas, occurs only when the matter is at the public hearing or in preparation for the hearing. 9 NYCRR § 465.14(d), Pet. App. 186a. This means that a complainant's attorney (assuming that complainant can even afford an attorney, *see* Pet. App. 176a) does not have the right to issue a subpoena until after the Division finds that there is probable cause and the matter is scheduled for public hearing. Exec. L. §§ 297.2.a. and 297.4.a., Pet. App. 181a.

The unavailability of early pre-hearing subpoenas was made clear in *State Div. of Human Rights v. Univ. of Rochester*, 386 N.Y.S.2d 147, 148 (App. Div. 4th Dept. 1976), which held:

> A private attorney may not issue a subpoena duces tecum during the investigatory stage of discrimination proceedings.
>
> * * *
>
> Before a determination of probable cause, the complainant may be represented by an attorney but

> the matter is to be investigated by the State Division. . . . If the Division requires preliminary information obtainable by subpoena, the statute provides it with that authority, but before the hearing stage the Division should be free to work its will without interference by the complainant's private attorney, *and the complainant is not permitted to use the subpoena power as a discovery device.*

(Emphasis added).

At best, a complainant's attorney can only request that the Division issue a subpoena during the pre-hearing stage, but whether or not a subpoena should issue is entirely discretionary with the Division. *See* 9 NYCRR §§ 465.14(a)(1) and (2) (designated Division personnel "may issue subpoena"), Pet. App. 185a. That discretion is circumscribed by the regulations establishing that, prior to the hearing stage, it is the Division that controls the fact-finding efforts; and the ruling in *State Div. of Human Rights v. Univ. of Rochester*, that "before the hearing stage the Division should be free to work its will without interference by the complainant's private attorney" trying to "use the subpoena power." 386 N.Y.S.2d at 148. Indeed, there is nothing in the extensive record of this case showing that the Division has ever issued a complainant requested pre-hearing subpoena so that documents and witness testimony could be obtained and preserved prior to the hearing being scheduled. *Cf. Wilwording v. Swenson*, 404 U.S. at 250 (where Court was not referred to a single instance where state courts "granted a hearing to state prisoners on the conditions of their confinement[,]" petitioners were not required to pursue alternative remedies "as a prerequisite to taking their claims to federal court."). The record does, however, show that by the time a complainant reaches the point that his or her attorney would have the right to issue a subpoena for documents or witnesses, the complainant will have already been exposed to years of delays, which increase the risk of an erroneous determination. Pet. App. 60a-61a.

The Second Circuit also relied upon the Division's liberal evidentiary rules as a basis for finding that any delay prejudice due to absent witnesses could be ameliorated. Pet. App. 17a-18a. Certainly those liberal rules give complainants much broader leeway in getting evidence into the record, but relying upon those rules to find that complainants "have it within their ability to ensure that their claims are not unduly prejudiced by any delay on the Division's part in affording a hearing" (*id.* 18a) misses the mark by a wide margin. The Second Circuit has simply ignored the fact that little, if any, weight will, or can, be accorded hearsay evidence — even in an administrative hearing process that permits the documents to be put in evidence without authentication and cross examination.

No reviewing court would ever entertain the view that a Division finding of unlawful discrimination could be based upon disputed facts contained in hearsay documents. Clearly, if a respondent is not provided with the right to cross examine witnesses regarding disputed factual claims made in documents submitted by a complainant in lieu of testimony, such respondents would be denied a fundamental due process right — and the discrimination finding would not be permitted to stand. *See Greene v. McElroy*, 360 U.S. 474 (1959) (pointing out the importance of cross examination in administrative cases); *Treadwell v. Schweiker*, 698 F.2d 137 (2d Cir. 1983) (lack of opportunity to cross-examine in administrative hearing denied due process). Indeed, regardless of how liberal the Division's evidentiary rules of practice may be, they cannot override State statutory law, which specifically provides that parties have the right of cross examination. *See* Exec. L. § 297.4.a ("The . . . parties shall be allowed to . . . cross examine witnesses"), Pet. App. 181a; N.Y. State Administrative Procedure Act § 306(3) (McKinney's 2001) ("A party shall have the right of cross-examination"), Pet. App. 182a.

In *Hecht v. Monaghan*, 307 N.Y. 461 (1954), the New York Court of Appeals directly addressed this point when it stated:

> The hearing held by an administrative tribunal acting in a judicial or quasijudicial (sic) capacity may be more or less informal. Technical legal rules of evidence and procedure may be disregarded. Nevertheless, no essential element of a fair trial can be dispensed with unless waived. That means, among other things, that the party whose rights are being determined must be . . . given the opportunity to cross examine witnesses. . . .

Id. at 470. (Citations omitted).

Thus, since complainants cannot conduct pre-hearing depositions to preserve witness testimony, and hearsay documents containing contested facts cannot be utilized as the basis for sustainable findings of discrimination, complainants' ability to effectively prosecute their claims is materially compromised as a direct consequence of the Division's unreasonable case processing delays. In short, the procedures for preserving and admitting evidence into the record that the Second Circuit relied upon either do not exist or are ineffectual to safeguard Petitioners' due process rights.

II. A SYSTEMIC VIOLATION OF AN AGENCY'S WRITTEN PROCEDURES PERMITS A DUE PROCESS CHALLENGE TO THE AGENCY'S PRACTICES

The Second Circuit rejected Petitioners' claim that the Division's notice process, as to complaints who were ACD'd for "failure to cooperate," was constitutionally defective because the Division had a procedure that could or "may" provide the information necessary to resolve any ambiguity in the actual written notices provided to complainants. Pet. App. 29a-30a. To underscore its ruling, the Second Circuit found that a challenge to the individual notices was really an "as applied"

claim for which NOW did not have standing as an organization. *Id.* 29a n.5. The record in this case supports neither finding.

Relying upon *Reno v. Flores*, 507 U.S. 292, 301 (1993), the Second Circuit found that when an administrative agency has a written policy, a plaintiff must show that "under 'no set of circumstances' would the Division's ACD Policy be constitutionally adequate." Pet. App. 29a. However, the Second Circuit's reliance upon *Flores* is misplaced. In that case, this Court specifically noted that it did not have before it any findings of fact or any record "concerning the INS's interpretation of the regulation or the history of its enforcement." 507 U.S. at 300-01. In this case, the record shows that the Division failed to follow one or more mandated aspects of its complainant contact policy in 74.4% of the cases dismissed for the agency's convenience. L-3-L4, L-6 (showing that the Division failed to make any contact telephone call in 20.4% of the cases dismissed for its administrative convenience, and failed to make the two required telephone calls in 74.4% of those cases).

Further, as the district court found, the pre-deprivation notices that the Division used after 1991 were so inadequate that they were constitutionally defective. Pet. App. 96a, 101a. *See also* L9-L14 (examples of Division's notices and subsequent dismissal orders). Those insufficient notices to complainants were simply another aspect of the Division's systemic inadequate notice practice.

In *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988), this Court stated that "the Court has long recognized that a plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express [] policy, is 'so permanent and well settled as to constitute a "custom or usage" with the force of law' ". (Quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 168 (1970)).

The Second Circuit, ignoring the decisions of this Court, and the unrebutted record of the agency's widespread inadequate contact practices, ruled against Petitioners by speculating that

the Division "*may* have provided the claimants with constitutionally sufficient notice. . . ." Pet. App. 30a (emphasis added). A ruling regarding a significant constitutional right should not turn upon speculation or conjecture about what might have happened, especially where the record is devoid of even a hint of support for that assertion.

III. A STATE ADMINISTRATIVE CAUSE OF ACTION NEED NOT BE FINALLY DESTROYED BEFORE A PERSON CAN PROCEED WITH A § 1983 ACTION

In *Logan v. Zimmerman Brush Co.*, 455 U.S. at 430-31, this Court found that a state administrative discrimination cause of action is no less a form of property than a license, and that such actions require the same due process guarantees as other property interests.[8] However, the Second Circuit's decision carves out state discrimination claims as a lesser species of property right that, in its view, is not entitled to the full panoply of constitutional protections.

The Second Circuit, focusing on the specific facts of *Logan*, and this Court's language noting that the Illinois agency had "finally destroy[ed]" Logan's claim, Pet. App. 15a (citing *Logan*, 455 U.S. at 434), concluded that no due process violation could occur in this case because Petitioners' discrimination complaints had not been finally destroyed since those discrimination complaints were still pending. *Id.* 15a-19a. However, the Second Circuit simply ignored the predicate language in *Logan* where this Court made it quite clear that a hearing was "required before the owner is finally deprived of a protected property interest." *Logan*, 455 U.S. at 433. Indeed, the Second Circuit's finding is contrary to well-established legal principles articulated by this Court.

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8. This Court made this finding notwithstanding that, at the time Logan elected to file an administrative complaint, there was an available alternative State forum for his cause of action. He could have pursued his discrimination claim in State court under the then existing Equal Opportunities for the Handicapped Act. *Compare Logan*, 455 U.S. at 431, 435 n.9 *with* Pet. App. 10a-13a.

In *Fuentes*, this Court confirmed prior rulings that a final destruction of property is not required for due process to apply. 407 U.S. 67. Noting that the replevin procedure at issue "was not cast as a final judgment," the Court stated that "it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment," and must be preceded by a hearing. 407 U.S. at 84-85. Nothing in *Logan* changed this principle. In fact, that principle was relied upon in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), a year after *Logan* was decided. *Mennonite* involved the interest of a mortgagee in property sold for nonpayment of taxes. Even though the mortgagee had two years after the sale to redeem the property, the Court found that "[t]he tax sale immediately and drastically diminishe[d] the value of th[e mortgagee's] interest . . ." and, therefore, due process was implicated. *Mennonite*, 462 U.S. at 798. *See also Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) ("effects of [ex parte attachment] do not amount to a complete, physical, or permanent deprivation of real property; their impact is less than the perhaps temporary total deprivation of household goods or wages . . . [b]ut the Court has never held that only such extreme deprivations trigger due process concern.") (citations omitted).

Thus, contrary to the Second Circuit's understanding, *Logan* does not mean that no § 1983 action can lie until after the damage is irreparably done. Indeed, if the Second Circuit were correct, it would mean that *Logan* overruled the well-established principle, set forth in *Fuentes*, that a right to a hearing must, where possible, be granted before a person is finally deprived of a property interest, not afterward, in order "to minimize substantively unfair or mistaken deprivations of property. . . ." *Fuentes*, 407 U.S. at 81, 90-91. *See also Barry v. Barchi*, 443 U.S. 55, 74 (1979) (Brennan, J. concurring) ("To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm . . . can still be avoided").

The Second Circuit found that the Supreme Court decisions relied upon by Petitioners were distinguishable because they involved delay in obtaining post-deprivation hearings, whereas here, Petitioners were seeking relief for the Division's failure to provide timely pre-deprivation hearings. Pet. App. 16a. In the context of this case, such a distinction is without meaning, and defies logic. Regardless of the specific facts in this Court's unreasonable delay decisions, the over-arching principle enunciated by this Court is that, absent special circumstances, due process requires that a hearing be held before the risk of injury becomes a reality. If the Division does not provide Petitioners a timely pre-deprivation hearing and, as a consequence, they are substantially injured in their ability to prove their discrimination claims, there is no effective make-whole remedy that can be obtained through a post-deprivation proceeding. Furthermore, there is no finding in this case that special circumstances precluded the Division from holding timely pre-deprivation hearings for Petitioners. As this Court held in *Zinermon v. Burch*, 494 U.S. 113, 132 (1990): "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking."

In *Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996), *aff'd*, 520 U.S. 681 (1997), Judge Beam, in his concurring opinion, pointed out that:

> It is incorrect, in my view, for Mr. Clinton and his amicus to assert that the delay is of no consequence to Ms. Jones. Aside from the adage that justice delayed is justice denied, Ms. Jones faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time. To argue that this problem may be dealt with by episodic exceptions when the risk of loss is apparent is to miss the point. Only rarely does life proceed in such a foreseeable fashion.

* * *

> If a blanket stay is granted and discovery is precluded, . . . Ms. Jones will have no way that I know of . . . to perpetuate the testimony of any party or witness should they die or become incompetent during the period the matter is held in abeyance. Should the death or incompetence of a key witness occur, proving the elements of Ms. Jones's alleged causes of action will become impossible. Thus, her "chose in action" would be obliterated, or at least substantially damaged if she is denied reasonable and timely access to the workings of the federal tribunal.

Id. at 1363-64.

In affirming the Eighth Circuit's opinion, this Court recognized the harm that an inordinate delay would have upon Jones' ability to effectively prosecute her discrimination claim. The Court specifically found that the district court's grant of a stay of discovery and the trial, until the expiration of President Clinton's term, was an abuse of discretion because:

> Such a lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial. The complaint was filed within the statutory limitations period — albeit near the end of that period — and *delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party.*

Clinton v. Jones, 520 U.S. at 707-8. (Emphasis added).

In the circumstances presented here, to have any justice at all, federal redress for governmental prejudicial delay must be available before Petitioners' administrative causes of action are "finally destroyed." The Third Circuit, addressing the problem of prosecuting an action after long delay, properly applied this

Court's precedents when it found that "[e]ven if [plaintiff] retains the theoretical right to assert his cause of action at some time in the future, the time delay . . . will substantially increase the risk of governmental error and result in the de facto denial of his claims." *Holman v. Hilton*, 712 F.2d 854, 859 (3d Cir. 1983) citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

CONCLUSION

Petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JULY 23, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2000

(Argued: February 15, 2001 Decided: July 23, 2001)

Docket Nos. 98-9040(L), 98-9069(XAP),
99-9409(CON), 99-9430(XAP)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, NEW YORK CITY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN, WESTCHESTER COUNTY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN, on behalf of themselves, their members, and all others similarly situated, and CLARICE SEEGARS, BERNADETTE THOMAS, DELLIE BRITT, and JANE DOE, as Administratix, on behalf of themselves, and all others similarly situated,

Plaintiffs-Intervenors-Appellees-Cross-Appellants,

— v. —

GEORGE W. PATAKI, individually and as Governor of the State of New York, MARIO CUOMO, EDWARD MERCADO, individually and as Commissioner of the Division of Human Rights of the Executive Department of New York State, and MARGARITA ROSA,

Defendants-Appellants-Cross-Appellees.

Appendix A

Before:

WALKER, *Chief Judge*,
MESKILL and CALABRESI, *Circuit Judges*.

* * *

Judge Meskill joins the opinion and writes a separate concurrence with respect to Part I(B).

Judge Calabresi joins the opinion except for Part I(B) and writes separately to explain his reasons.

* * *

JOHN M. WALKER, JR., *Chief Judge*:

The present appeal arises from a 42 U.S.C. § 1983 class action brought by the New York State, New York City, and Westchester County chapters of the National Organization for Women (collectively "NOW"), and four individual plaintiffs-intervenors, seeking monetary, injunctive, and declaratory relief. *See N.Y. Nat'l Org. for Women v. Cuomo*, 14 F. Supp. 2d 424, 426-27 (S.D.N.Y. 1998) ("*NOW II*"); *see also N.Y. Nat'l Org. for Women v. Cuomo*, 182 F.R.D. 30, 32-35 (S.D.N.Y. 1998) ("*NOW I*"). They have brought suit on behalf of

> all persons who, since October 15, 1990, had filed or will file complaints of discrimination with the [New York State Division of Human Rights ("the Division" or "the Human Rights Division")] and

> whose complaints have not been, or will not be, finally administratively adjudicated or otherwise substantively resolved within three years of the date of the filing of the complaint [with the Division].

N.Y. Nat'l Org. for Women v. Pataki, 189 F.R.D. 286, 292 (S.D.N.Y. 1999) ("*NOW III*"). Of relevance to this appeal, they allege that the Division violated the class members' Fourteenth Amendment procedural due process rights through: (1) protracted delays in processing their discrimination claims that prejudiced the claims; and (2) purported notice deficiencies preceding the administrative convenience dismissal ("ACD") of their claims. *Id.* at 302-04. The defendants-appellants are the current Governor of New York, George W. Pataki; his predecessor Mario Cuomo; the current Commissioner of the Human Rights Division, Edward Mercado; and his predecessor Margarita Rosa. *Id.* at 291-92.

The defendants appeal from two orders of the District Court for the Southern District of New York (Robert L. Carter, *District Judge*): one that had partially denied them qualified immunity from money damages in their personal capacity, *see NOW II*, 14 F. Supp. 2d at 434, and a second, following a bench trial, that awarded plaintiffs injunctive and declaratory relief and ordered defendants to formulate a "Joint Remedial Plan" with plaintiffs to ameliorate the constitutional violations, *see NOW III*, 189 F.R.D. at 314-15. With respect to the district court's interlocutory order partially denying defendants' motion for qualified immunity, we have appellate jurisdiction under the collateral order

doctrine. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 528-30 (1985). Our jurisdiction over the district court's grant of declaratory and injunctive relief and order of submission of a remedial plan is pursuant to 28 U.S.C. § 1292(a). *See Spates v. Manson*, 619 F.2d 204, 209 (2d Cir. 1980).

The propriety of both orders, as well as various issues raised by plaintiffs' cross-appeal, turns on whether the plaintiffs have asserted cognizable Fourteenth Amendment procedural due process violations as a result of the Division's handling and processing of the class members' claims of discrimination. Because we find that no procedural due process violations are presented, we vacate the district court's partial denial of qualified immunity and its award of injunctive and declaratory relief, and dismiss plaintiffs' procedural due process claims.

BACKGROUND

A. The Human Rights Law and the Division

Promulgated in 1945, New York's Human Rights Law, 18 N.Y. Exec. L. §§ 290-301, proscribes discrimination based on age, race, creed, color, national origin, sex, disability, genetic predisposition, carrier status, or marital status. *See id.* § 296. Such discrimination is prohibited in employment, housing, licensing, public accommodations, and public services, among other areas. *See id.*

An individual who is aggrieved by instances of discrimination prohibited under the Human Rights Law "may elect to seek redress in either an administrative or a judicial

forum. As a general rule, the remedies are intended to be mutually exclusive." *Legg v. Eastman Kodak Co.*, 670 N.Y.S.2d 291, 292 (App. Div. 4th Dep't 1998). The Division handles the administrative adjudication of claims. *See* 18 N.Y. Exec. L. § 297.

Until the law was changed in 1997, a complainant was precluded from dismissing the administrative action in order to file a complaint in court once he or she elected to proceed with the administrative process. In 1997, however, the New York legislature amended the Human Rights Law to permit a complainant to annul his or her election of the administrative process prior to a hearing and then proceed to court. *See id.* at § 297(9); *see also Whidbee v. Garzarelli Food Spec., Inc.*, 223 F.3d 62, 75-76 (2d Cir. 2000); *Legg*, 670 N.Y.S.2d at 292; N.Y. Comp. Code R. & Regs. tit. 9, § 465.5(e)(vi). If such an annulment is made, any judicial proceedings are subject to New York's general three-year statute of limitations, measured from the occurrence of the discrimination, with no tolling for the period in which the claim was pending in the administrative process. *See* 18 N.Y. Exec. L. § 297(9); *Sprott v. N.Y. City Hous. Auth.*, 1999 WL 1206678, at *2-*3 (S.D.N.Y. Dec. 16, 1999).

Upon a complainant's election to proceed in the administrative forum, the Division becomes responsible for the following: serving the respondent employer (or landlord), conducting an investigation, and making a "probable cause" determination. *Id.* at § 297(2); N.Y. Comp. Code R. & Regs. tit. 9, §§ 465.6 (investigations), 465.8 (probable cause review). If warranted, the Division will then issue a notice requiring respondent to answer and appear at a hearing before

an administrative law judge, who will conduct a hearing, render a decision, and issue an order. *See* N.Y. Exec. L. § 297(4); N.Y. Comp. Code R. & Regs. tit. 9, §§ 465.11 (notice of hearing), 465.17 (orders after hearing). Unless a claimant wishes to retain a private attorney, the Division will assign one of its staff attorneys to present the case at the administrative hearing. *See* 18 N.Y. Exec. L. § 297(4)(a); *see also* N.Y. Comp. Code R. & Regs. tit. 9, § 465.13(d)(1)-(2). The Human Rights Law sets out time constraints on the Division's actions, *see* N.Y. Exec. L. §§ 297(2)(a) & (4), but these constraints have been deemed "directory, not mandatory." *Hous. Opportunities Made Equal, Inc. v. Pataki*, 716 N.Y.S.2d 215, 216 (App. Div. 4th Dep't 2000).

B. The Due Process Claims

In their complaint, plaintiffs allege, in substance, two categories of purported procedural due process violations. The first category involves processing delays and the second involves defective notice.

1. Processing Delays

In 1990, the Division began to experience substantial delays in its processing time for claims, and a sizeable backlog soon developed. Plaintiffs' statistician testified before the district court that of 43,227 cases the Division closed between October 15, 1990 and April 10, 1998, "34% of that total took more than three years from filing to closing," with the "mean time . . . somewhat in excess of 2½ years." *NOW III*, 189 F.R.D. at 295. He also testified that of 3,947 claims that received probable cause determinations, "the

mean measured in days [for these claims to be finally resolved] was 2,005 days or 5.5 years." *Id.*

The plaintiffs attribute the Division's backlog to several causes including: (1) the failure of Governors Cuomo and Pataki to maintain the Division's funding at parity with the overall state fund disbursement to government operations; (2) the failure of the two governors to provide additional resources to the Division by temporarily redeploying state employees from other agencies; (3) the failure of Commissioners Rosa and Mercado to exercise their statutory authority to request staffing assistance from other governmental departments and agencies, *see* N.Y. Exec. L. § 295(4); and (4) the failure of the two commissioners to fill staff vacancies as they occurred.

The plaintiffs contend that the defendants' acts and omissions prejudiced class members' ability to succeed on their discrimination claims. As the plaintiffs' brief states:

> The passage of time increases the likelihood that witnesses and documents will be unavailable, complainants will die, and memories will fade, which undermines the credibility of victims of discrimination, and non-victim witnesses. Thus, lengthy delays prejudiced complainants in their ability to prove their discrimination claims.

2. Defective Notice

The second category of alleged procedural due process violations focuses on purported notice deficiencies related

to certain claims the Division dismissed for administrative convenience. According to the plaintiffs, the Division, "to remedy the inordinate case processing delays," dismissed 5,152 cases between October 15, 1990 and April 10, 1998 "for [the Division's] administrative convenience ('ACD') on the grounds that it was unable to locate ('failure to locate') the complainant, or the agency determined that the complainant had failed to cooperate ('failure to cooperate')." The plaintiffs contend that these ACD dismissals violated due process because the Division failed (1) to reasonably attempt to locate claimants first, or (2) to unambiguously notify claimants that their claims were at risk of dismissal before issuing ACD's for failure to cooperate.

C. The Subclasses

To address the plaintiffs' claims of prejudicial delay and ineffective notice, the class was subdivided as follows:

> *Subclass A*: "[A]ll persons who have been, are, or will be subject to dismissal of their complaints because defendants Rosa and Mercado have taken longer than three years from the date the complaint was filed to render a final determination.";
>
> *Subclass B*: "[A]ll persons who have been, are, or may be subject to a reduction in the monetary relief awarded, either by order of Rosa, Mercado, or by a court because defendants Rosa and Mercado have taken longer than three years from the date the complaint was filed to render a final administrative determination"; and,

> *Subclass C*: "[A]ll persons who have been, are, or may be subject to ACD dismissals because the Division was either unable to locate complainants or had determined that the complainants had failed to cooperate and that their complaints had been pending for more than one year."

NOW III, 189 F.R.D. at 292.

Each subclass had different class representatives. Subclass A was represented by individual plaintiffs Jane Doe, administratrix for the deceased John Doe, Dellie Britt, Bernadette Thomas, and Clarice Seegars, who had experienced processing delays respectively of five, seven, seven, and nine years. Subclass B was represented by plaintiff Seegars alone. No individual plaintiff represented subclass C; rather, as to subclass C, NOW proceeded as the class representative by mounting a facial challenge to the Division's published policies regarding the granting of ACD's for failure to locate or failure to cooperate. *See, e.g.*, *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997) ("An organizational plaintiff . . . may have standing to sue on its own behalf 'to vindicate whatever rights and immunities the association itself may enjoy' or, under proper conditions, to sue on behalf of its members asserting the members' individual rights." (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975))).

DISCUSSION

We first consider the due process claims of subclasses A and B based on allegations of prejudicial delay, and then those

of subclass C based on allegations of defective notice. We observe at the outset that the Fourteenth Amendment guarantee of due process is fully applicable to adjudicative proceedings conducted by state and local government administrative agencies. *See Richardson v. Perales*, 402 U.S. 389, 401-02 (1971).

I. DELAY

The question we must resolve is: were the members of subclasses A and B denied constitutionally adequate process as a result of the delays they experienced while prosecuting their discrimination claims before the Division? Before this question may be answered in the affirmative, we must determine that: (1) the members of subclasses A and B possessed a constitutionally protected property interest, (2) the deprivation of which resulted from government action (3) without constitutionally adequate pre- or post-deprivation process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

A. Property Interest

There is no dispute that a legal cause of action constitutes a "species of property protected by the Fourteenth Amendment's Due Process Clause." *Id.*; *see, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312-13 (1950); *Polk v. Kramarsky*, 711 F.2d 505, 508-09 (2d Cir. 1983). What the parties do dispute is whether this is the only property interest at issue in the instant case or whether, when a state affords alternative procedural forums for pursuing a cause of action as New York has here, individuals gain a

constitutionally protected property interest not only in the cause of action, but also in the forum in which they elect to pursue that cause of action.[1] The district court held that the claimants here possessed a constitutionally protected property interest in pursuing their claims before the Division. *See NOW III*, 189 F.R.D. at 306. We disagree.

The only property interest at issue in this case is the legal cause of action itself, independent of the various procedural options available for pursuing the action. *See Polk*, 711 F.2d at 508-09; *cf. McMenemy v. City of Rochester*, 241 F.3d 279, 287-88 (2d Cir. 2001) ("Although New York State law clearly requires a 'competitive' examination, the law does not create a cognizable property interest in a competitive examination. An examination is not an end in itself; it has value only because it may lead to something valuable." (citing *Bigby v. City of Chicago*, 766 F.2d 1053, 1056 (7th Cir. 1985)); *Fusco v. Connecticut*, 815 F.2d 201, 205-06 (2d Cir. 1987) ("The opportunity granted abutting landowners and aggrieved persons to appeal decisions of planning and zoning commissions and zoning boards of appeal is purely procedural and does not give rise to an independent interest protected by the [F]ourteenth [A]mendment.").

Our conclusion follows from the fact that procedural due process protects only important and substantial expectations in life, liberty, and property. *See Ezekwo v. N.Y. City Health & Hosps. Corp.*, 940 F.2d 775, 783 (2d Cir. 1991) (procedural due process does not protect "trivial and insubstantial

1. Of course, we do not mean to say that this is all the parties dispute in this case. We are simply noting their competing views as to the constitutionally-protected property right at issue.

interest[s]"). "Process is not an end in itself. Its constitutional purpose is to protect a *substantive interest* to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983) (emphasis added); *see Montgomery v. Carter County, Tennessee*, 226 F.3d 758, 768 (6th Cir. 2000) ("What the Due Process clauses of the Fifth and Fourteenth Amendments protect is 'life, liberty, [and] property,' not the procedures designed to protect life, liberty, and property." (internal citation omitted) (alterations in original)). Here, the only substantive expectation that warrants constitutional recognition is the entitlement under New York law to remedy injuries resulting from discrimination proscribed by the Human Rights Law. *See Ezekwo*, 940 F.2d at 782 ("While state law defines the underlying substantive interest, 'federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause.' " (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978))).

Indeed, the only distinct interest claimants appear to have in vindicating their rights before the Division, rather than in state court, is that " '[t]he administrative forum offers a complainant remedies not available from a court.' " *NOW III*, 189 F.R.D. at 306 (quoting *Marine Midland Bank v. N.Y. State Div. of Human Rights*, 75 N.Y.2d 240, 244 (1989) (alterations in original)). Yet, recovery of these additional remedies in any particular case hinges on the Division exercising its discretion to actually award one or more of these remedies.

The Fourteenth Amendment due process guarantee, however, only extends to property claims to which an

individual has a "legitimate claim of entitlement." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Where, as here, a purported property interest is contingent on the exercise of executive discretion, no legitimate claim of entitlement exists. "[A] constitutionally protected interest cannot arise from relief that the executive exercises unfettered discretion to award." *Sad v. INS*, 246 F.3d 811, 819-20 (6th Cir. 2001); *see also Baldwin v. Daniels*, 250 F.3d 943, 946 (5th Cir. 2001) ("Discretionary statutes do not give rise to constitutionally protectable interests."); *cf. Shaner v. United States*, 976 F.2d 990, 994-95 (6th Cir. 1992) (holding that loan contingent on agency's "broad discretion in determining whether to approve [the] application" was "too speculative to be considered a property right"). Thus, the claimants' interest in the additional remedies afforded in the administrative process is not a property expectation as to which the Constitution mandates due process.

Accordingly, we hold that the class members' only constitutionally protected property interest at issue here is the discrimination cause of action itself.

B. Government Deprivation

Having identified the protected property interest, we turn to whether the members of subclasses A and B suffered a deprivation. The parties appear to agree that if New York were to have flatly precluded a claimant from pursuing his or her discrimination claim in all available procedural forums and thereby extinguished the claim, a deprivation would have occurred. *See, e.g., Logan*, 455 U.S. at 432-33; *cf. Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 488

(1988) (due process implicated where proceedings "completely extinguished appellant's claim"). The parties, however, are in sharp disagreement over whether government action — or in this case inaction — that does not finally extinguish a claim, but nonetheless prejudices it, can also constitute a government deprivation.

Accepting the plaintiffs' contention, the district court held that "an administrative delay causing actual prejudice to a [claimant's] claim is sufficient to show deprivation under the due process clause." *NOW III*, 189 F.R.D. at 307; *see also Pepsico, Inc. v. Rosa*, 612 N.Y.S.2d 74, 75 (App. Div. 2d Dep't 1994) (holding that almost ten-year delay alone, without "showing of substantial prejudice," would not extinguish discrimination claim). Indeed, the district court went so far as to hold that this formulation was already "clearly established" in our constitutional jurisprudence. *NOW II*, 14 F. Supp. 2d at 431. The district court further concluded that "[a]ctual prejudice is shown when plaintiff[s] demonstrate[ ] that delay led to the loss of documentary evidence or a key witness." *NOW III*, 189 F.R.D. at 308.

Below, we consider first the district court's conclusion that it is "clearly established" that bureaucratic delay plus actual prejudice can constitute a deprivation, and, finding that it was not clearly established, we then consider whether this formulation is sufficient to establish a deprivation.

1. Qualified Immunity

The district court's holding, for purposes of qualified immunity, that it was "clearly established" that administrative

delay followed by actual prejudice constitutes a government deprivation was considerably wide of the mark. *See NOW II*, 14 F. Supp. 2d at 430-32.

A government actor performing a discretionary task is entitled to immunity from § 1983 suits if his or her "action did not violate clearly established law." *Salim v. Proulx*, 93 F.3d 86, 89 (2d Cir. 1996); *see Warren v. Keane*, 196 F.3d 330, 332 (2d Cir. 1999). "A right is 'clearly established' if '[t]he contours of the right [are] sufficiently clear' " in the context of the alleged violation such " 'that a reasonable official would understand that what he is doing violates that right.' " *LaBounty v. Coughlin*, 137 F.3d 68, 73 (2d Cir. 1998) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

None of the cases relied on by the district court satisfy this standard. *Logan v. Zimmerman Brush Co.*, which the district court stated "control[led]" the denial of qualified immunity, *NOW II*, 14 F. Supp. 2d at 430-31, held only that "the State may not *finally destroy* a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan*, 455 U.S. at 434 (emphasis added); *see also post* at 32a-34a (Meskill, *J.*, concurring). The "final destruction" addressed in *Logan* resulted from an Illinois statute that flatly extinguished a plaintiff's cause of action, not from government delay that prejudiced the claim.

The remaining cases relied on by the district court, which it characterized collectively as "stand[ing] commandingly for the proposition that administrative delay" leading to actual prejudice "may violate the due process clause," *NOW II*, 14 F. Supp. 2d at 431, are inapposite to the situation at hand.

See also post at 34a-36a (Meskill, *J.*, concurring). Those cases were concerned with the effect of delay on the adequacy of *post-deprivation* remedies, and, unlike the situation here, did not involve the issue of whether government delay, in and of itself, can constitute a deprivation. *See, e.g.*, *Kraebel v. N.Y. City Dep't of Hous. Pres. & Dev.*, 959 F.2d 395, 404-06 (2d Cir. 1992) (considering whether delay in affording post-deprivation relief violated due process); *Isaacs v. Bowen*, 865 F.2d 468, 476-77 (2d Cir. 1989) (same); *G.I. Distribs. v. Murphy*, 469 F.2d 752, 756-57 (2d Cir. 1972) (same), *vacated & remanded*, 413 U.S. 913 (1973), *and reaff'd by* 490 F.2d 1167 (2d Cir. 1973).

2. The Delay-Plus-Actual-Prejudice Formulation

Substantial — likely insurmountable — difficulties surround the district court's delay-plus-actual-prejudice formulation. *See also post* at 37a-38a (Meskill, J., concurring). Without excusing New York's gross bureaucratic delays, the fact remains that plaintiffs are generally the masters of their legal actions. As such, they bear the responsibility for preventing actual prejudice to their claims by investigating, memorializing testimony from potentially forgetful or absent witnesses, and preserving documents.

While the claimants here did not have resort to the full battery of discovery devices generally afforded litigants in courts of law, our review of the Human Rights Division's rules of practice indicates that claimants are afforded sufficient means to prevent — well before any period of delay that *might* be considered constitutionally suspect — the types of prejudice the district court identified as actionable

(i.e., loss of documentary evidence and loss of key witnesses). Claimants may engage an attorney, *see* N.Y. Code R. & Regs. tit. 9, §§ 465.12(b) & 465.13(a), who in turn, prior to the hearing before the ALJ, may apply to have the Division subpoena parties and witnesses for depositions and document production, *see* N.Y. Comp. Code R. & Regs. tit. 9, § 465.14, and, during the hearing, may directly subpoena parties and witnesses, *see id.* at § 465.14(2)(c). *See also State Div. of Human Rights v. Univ. of Rochester*, 386 N.Y.S.2d 147, 148 (App. Div. 4th Dep't 1976) ("This power to issue subpoenas . . . was designed to make evidence available at a hearing on the merits. Before a determination of probable cause, the complainant may be represented by an attorney but the matter is to be investigated by the [Division].").

Moreover, due to the relaxed nature of the Division's evidentiary rules, claimants may introduce at the hearing before the ALJ subpoenaed materials in lieu of live testimony, thus ameliorating prejudice a claimant might otherwise experience due to absent witnesses, *see, e.g.*, N.Y. Comp. Code R. & Regs. tit. 9, §§ 465.12(e)(1) ("Hearsay evidence is fully admissible."); (e)(3) ("Documentary evidence may be admitted without testamentary foundation, where reasonable."); (e)(5) ("Information from witnesses may be introduced in the form of affidavits, without oral examination and cross examination."); (e)(9) ("Written stipulations may be introduced in evidence if signed by the person sought to be bound thereby or by that person's attorney-at-law. . . . The entire record may be in the form of a stipulation, submitted to the chief administrative law judge without the convening of a hearing before an administrative law judge."); (e)(11) ("Where reasonable and convenient, the administrative judge

may permit the testimony of a witness to be taken by telephone. . . ."). With these tools at hand, we have little doubt that claimants have it within their ability to ensure that their claims are not unduly prejudiced by any delay on the Division's part in affording a hearing.

Compounding our doubts as to the district court's conclusion that delay coupled with actual prejudice constitutes a due process deprivation is the fact that the only cases we have uncovered that adopted this formulation as part of a due process inquiry arose in a completely inapposite context.[2] *See, e.g.*, *Consol'n Coal Co. v. Borda*, 171 F.3d 175, 183 (4th Cir. 1999); *DeMichele v. Greenburgh Cent. Sch. Dist.*, 167 F.3d 784, 791 (2d Cir. 1999); *Lane Hollow Coal Co. v. Dir., OWCP*, 137 F.3d 799, 807-08 (4th Cir. 1998); *United States v. Elsbery*, 602 F.2d 1054, 1059 (2d Cir. 1979). In each of these cases, the defendant, not the plaintiff, was alleged to have been prejudiced as a result of a delay, and the delays involved were in the receipt of notification that proceedings would be instigated, not delay in actually litigating the matter once both parties were on notice of the

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2. In a recent opinion issued while this appeal was pending, the Appellate Division for the Fourth Department intimated that a claimant may be able to bring a state law claim for money damages against state officials if the claimant can establish "substantial actual prejudice [to his or her discrimination claim] resulting from [the Division's] delay." *See Hous. Opportunities Made Equal, Inc.*, 716 N.Y.S.2d at 216 (internal quotation marks omitted). We need not consider the issue here, however, because the plaintiffs have not raised such a state law claim in their complaint, and indeed would be precluded from doing so in federal court under the Eleventh Amendment, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104-05, 121 (1984).

proceedings. Thus, the delay in notifying the defendants in these cases denied them, throughout the entire period of the delay, an opportunity to preserve records, memorialize witness accounts, and maintain other materials necessary to advance a meaningful defense. Here, by contrast, both the claimants and the respondents were always aware that they would, if only belatedly, be expected to present their case before the Division.

Because, as we discuss below in Part I(C), we hold that constitutionally adequate process was afforded the members of subclasses A and B, we need not finally resolve whether actual prejudice to a cause of action following a period of extreme government delay is sufficient to make out a property deprivation, or whether instead the government action must flatly extinguish the cause of action before a property deprivation can be made out. *Accord Hous. Opportunities Made Equal, Inc.*, 716 N.Y.S.2d at 216 (holding that complaints before the Division must be "extinguished" to give rise to a due process violation). It suffices to say at this juncture that we have deep reservations.

C. Adequate Process

Regardless of whether a property deprivation occurred, it is plain that the members of subclasses A and B were afforded procedures that satisfied the Fourteenth Amendment's due process requirement. In reaching this conclusion, we follow the now familiar analysis set forth by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The *Mathews* analysis requires us to weigh: (1) "the private interest that will be affected by the official

action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.; see also Logan*, 455 U.S. at 434; *Holman v. Hilton*, 712 F.2d 854, 859 n.7 (3d Cir. 1983).

After balancing these considerations, the district court concluded that the Division's processing delays were "clearly unreasonable" and the claimants were denied due process. *NOW III*, 189 F.R.D. at 310. While the processing delays were extensive and may well have been unreasonably so, we cannot agree with the district court's conclusion that due process was denied.

In carrying out the *Mathews* analysis, the district court failed to consider the availability of other procedures that could have prevented the claimants from suffering prejudicial delay. More precisely, the district court erred in not considering Article 78 proceedings and how (if utilized by the claimants) these proceedings could have reduced claimants' risk of experiencing prejudicial delay. *See* N.Y. C.P.L.R. 7801-06.

In an Article 78 proceeding, New York state courts are empowered to issue "common law writs of certiorari to review, mandamus, and prohibition." *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 881 (2d Cir. 1996); *see* N.Y. C.P.L.R. 7801 ("Relief previously obtained by writs of certiorari to review,

mandamus or prohibition shall be obtained in a proceeding under this article."); *see also Hamptons Hosp. & Med. Ctr., Inc. v. Moore*, 52 N.Y.2d 88, 91 (1981) (holding that an Article 78 proceeding may lie in the absence of a final determination where the relief sought is by way of prohibition or mandamus to compel performance by an administrative agency of a duty enjoined by law); *see generally* David D. Siegel, *CPLR Provided Escape from Common Law Technicalities*, 73 N.Y. St. B.J. 10, 14 (January 2001). Once the delay in the processing of any claim of the members of subclasses A and B became unreasonable, each member could have brought an Article 78 proceeding to mandamus Division officials to proceed expeditiously to resolve the discrimination claim. *See, e.g., Katz v. Klehammer*, 902 F.2d 204, 207 (2d Cir. 1990) ("To the extent that the Housing Law and state and city regulations compel the supervising and other city officials to perform certain acts, Article 78 may thus serve to enforce such requirements when officials fail to fulfill these obligations."); *Hous. Opportunities Made Equal, Inc.*, 716 N.Y.S.2d at 216 (noting that state courts may "grant[ ] mandamus to compel hearings"); *Tall Trees Constr. Corp. v. Zoning Bd. of Appeals*, 717 N.Y.S.2d 369, 370-71 (App. Div. 2d Dep't 2000) (Article 78 proceeding directing zoning board, which had "relied on its tie vote to unduly delay taking any decisive action," to conduct a new hearing on petitioner's zoning applications within 30 days), *lv. to appeal granted*, 96 N.Y.2d 710 (2001). By doing so, the members of subclasses A and B could have substantially reduced, if not eliminated, the risk of prejudice to their claims from further delay.

Given the availability of Article 78 procedures, which can be invoked *before* actual prejudice arises (unlike a § 1983

damage claim, which presumably would arise only after actual prejudice had occurred), we find that the second *Mathews* factor weighs dispositively in favor of the government. Thus, we hold that New York has afforded the members of subclasses A and B all of the process they are due under the Fourteenth Amendment of the Federal Constitution.[3] *See, e.g., River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) (holding availability of common law writ of certiorari adequate process for zoning board delay); *Orange Lake Assocs., Inc. v. Kirkpatrick*, 21 F.3d 1214, 1221, 1224 (2d Cir. 1994) (stating that zoning board's delay did not violate due process because, *inter alia*, Article 78 procedure constituted adequate process); *see also Bello v. Walker*, 840 F.2d 1124, 1128 (3d Cir. 1988) ("[A] state provides adequate due process when it provides 'reasonable remedies to rectify a legal error by a local administrative body.' " (internal quotation marks omitted)).

Two final points warrant mention. First, recognizing the state courts' responsibility for preventing Division delays through Article 78 proceedings is more consistent with the "spirit" of federalism than is unnecessarily subjecting state agencies to intrusive federal court intervention under the guise of § 1983. *See, e.g., Idaho v. Coeur d'Alene Tribe*,

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3. Because we hold that Article 78 proceedings provide a meaningful *pre*-deprivation remedy, we need not decide whether the "alleged deprivations" — i.e., processing delay followed by actual prejudice — are "random and unauthorized," or instead are based in established state procedures. *See Alexandre v. Cortes*, 140 F.3d 406, 411 (2d Cir. 1998) (noting that the existence of independent state post-deprivation remedies are a defense only when the deprivation at issue was "random and unauthorized").

521 U.S. 261, 276 (1997) (Kennedy, J., joined by Rehnquist, C.J.) ("It is a principal concern of the court system in any State to define and maintain a proper balance between the State's courts on one hand, and its officials and administrative agencies on the other hand. . . . Where, as here, the parties invoke federal principles to challenge state administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of state officials."); *Albright v. Oliver*, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring, joined by Thomas, J.) (noting generally the importance of considering "the delicate balance between state and federal courts" in the "design of § 1983" causes of action).

Second, by contemplating that claimants seek relief through Article 78 proceedings, we are not contravening the general rule that exhaustion is not required for § 1983 claims. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982); *see generally* Erwin Chemerinsky, *Federal Jurisdiction* § 8.4 (3d ed. 1999). "[E]xhaustion *simpliciter* is analytically distinct from the requirement that the harm alleged has occurred. Under the jurisprudence, a procedural due process violation cannot have occurred when the governmental actor provides apparently adequate procedural remedies and the plaintiff has not availed himself of those remedies." *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

II. NOTICE

NOW, as subclass C's representative, asserts that the Division failed to provide constitutionally adequate notice to the members of subclass C before it dismissed for

administrative convenience ("ACD") their discrimination claims for failure to locate or failure to cooperate. The district court agreed with NOW, concluding that the "Division did not take all reasonable steps" to locate and inform "complainants that their claims were at risk for ACD, and therefore deprived complainants of their claims without adequate predeprivation notice." *NOW III*, 189 F.R.D. at 309. For the reasons we discuss below, we disagree.

A. Is Notice Required?

When a government agency terminates or impairs an individual's constitutionally cognizable property interest through adjudicative proceedings, due process requires that the individual be given adequate notice for the proceedings to be "accorded finality." *Craft*, 436 U.S. at 13 (quoting *Mullane*, 339 U.S. at 314); *see also Sterling v. Envtl. Control Bd.*, 793 F.2d 52, 56-58 (2d Cir. 1986).

The New York Attorney General, arguing on behalf of the defendants, contends that notice is not required prior to an ACD for failure to locate or for failure to cooperate because the ACD does not extinguish a claimant's cause of action. Rather, the Attorney General argues, a claimant whose claims are ACD'd becomes free to pursue his discrimination claim in New York state court and further that the three-year statute of limitations for bringing suit is tolled during the entire pendency of the Division's proceedings. *Cf.* N.Y. Exec. L. § 297(9); N.Y. C.P.L.R. 204(a); *see also Marine Midland Bank*, 75 N.Y.2d at 244-45. Notably, this differs from the situation in which the claimant annuls his or her election of remedies, where the statute of limitations for bringing suit

in state court is expressly not tolled during the pendency of the administrative proceedings. *See* N.Y. Exec. L. § 297(9).

Were we to find that the Attorney General's reading of section 297(9) is correct, we would agree that the ACDs for failure to locate and for failure to cooperate did not deprive claimants of their discrimination claims and thus do not trigger due process scrutiny. This is because a complaint must be filed with the Division within one year of the accrual of a cause of action, whereas a state court action must be commenced within three years. *See* N.Y. Exec. L. § 297(5); *Marine Midland Bank*, 75 N.Y.2d at 244-45. Thus, under the Attorney General's reading, a complainant would always have at least two years remaining following an ACD in which to proceed with an action in state court. Moreover, individualized notice to a claimant is not required for purposes of the running of the statute of limitations. *See, e.g., United States v. Locke*, 471 U.S. 84, 108-10 (1985); *Texaco, Inc. v. Short*, 454 U.S. 516, 536-37 (1982); *see generally* Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 17.8, at 104 (3d ed. 1999) ("When individual interests are adversely affected by legislative action [such as a statute of limitations], there is no notice issue, because publication of a statute is normally considered to put all individuals on notice of a change in the law of a jurisdiction."); Kenneth Culp Davis & Richard J. Pierce, Jr., 2 *Administrative Law Treatise* § 9.2, at 3-9 (3d ed. 1994).

NOW, however, advances an equally persuasive rebuttal argument. NOW contends that the Attorney General's reading "would vitiate the election of remedies mandate," *see* 18

Exec. L. § 300, because a claimant "could compel an ACD simply by refusing to cooperate with the Division's process," and then file in state court with the benefit of the statute of limitations having been tolled. *See, e.g.*, N.Y. Comp. Code R. & Regs. tit. 9, § 465.5(e)(vi) (intimating legislative concern that "administrative convenience dismissal[s]" not "contravene the election of remedies provisions"); *Legg*, 670 N.Y.S.2d at 292 (same).

Recognizing that resolution of this question has significant import to the administration of state judicial proceedings, we leave it for the New York state courts to decide the proper understanding of section 297(9) in the first instance. Doing so, however, does not affect our ability to dispose of this case because, as we discuss in Part B below, we find that NOW has failed to establish that the notice afforded members of subclass C offends due process.

B. Has NOW Established Inadequate Notice?

In mounting a facial challenge, NOW asserts that the Division's published ACD policy ("the Policy") is unconstitutional on its face.[4] *See NOW III*, 189 F.R.D. at 304.

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4. The district court properly dismissed for lack of standing NOW's "as applied" challenge, which alleged that the "Division failed to follow its own procedures for contacting complainants and therefore arbitrarily extinguished plaintiffs[']rights." *NOW III*, 189 F.R.D. at 304. Such a challenge would plainly require examination of facts specific to each claimant concerning whether the Division's particular efforts to locate and inform each of them that they were at risk for an ACD comported with the strictures of due process. *See, e.g., Rent Stabilization Assoc. v. Dinkins*, 5 F.3d 591, 596-97 (2d Cir. 1993).

In so doing, it "bear[s] [the] heavy burden" of demonstrating that, as written, the Policy " 'could *never* be applied' " in a manner that would afford claimants constitutionally adequate notice. *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 992 (2d Cir. 1997) (quoting *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988)) (emphasis added).

As for those members of subclass C whose claims were ACD'd for failure to locate, the district court agreed with NOW that the Division's published Policy, as promulgated, did not afford them constitutionally adequate notice. *See NOW III*, 189 F.R.D. at 311. The Policy requires that before such dismissals can be granted, staff members must attempt to contact the claimants by, among other means, mailing "two letters, the second letter being certified." *Id.* at 296. The district court found that the Policy's provision for the use of the mails to contact claimants who have moved violates due process because the postal service's "mail forwarding ceases after one year." *Id.* at 311; *see also id.* at 315 (ordering that the Division "use the Internal Revenue Service Mail Forwarding Service to locate persons whose claims are at risk for ACD"). We disagree.

Due process does not require that parties actually receive notice of the pendency of the government deprivation. All that is required is that the method and form of the notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314 ("The means employed must be such as one desirous of actually informing the absentee might

reasonably adopt to accomplish it."); *see Pope*, 485 U.S. at 484, 489-91 (1988). "There is 'no rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions.' " *Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 254 (2d Cir. 1995) (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956)).

In reaching its conclusion that the Division's reliance on mail forwarding was insufficient, the district court apparently gave no weight to the claimants' responsibility to provide the Division with updated contact information whenever they change addresses. Upon filing a claim with the Division, claimants (1) are informed that they must notify the Division "of any change in [their] address, telephone number or place of employment" and that "failure to do so may jeopardize [their] rights," (2) are provided with a change-of-contact-information form, and (3) are informed again in a follow-up letter of their obligation to notify the Division if they change their address.

Simply put, we believe that when parties that are litigating claims before a government agency are obligated to notify the agency of a change of address, a requirement that the agency do more than rely on the latest information provided it by the litigants when sending out notice would demand a level of government paternalism that due process does not require. *Cf. Small v. United States*, 136 F.3d 1334, 1337 (D.C. Cir. 1998) (holding that "when the government knows (or can easily ascertain) where a person may be found, it must direct its notice there, and not to some other address where the designee formerly resided").

Accordingly, with respect to those members of subclass C whose claims were ACD'd for failure to locate, we hold that the Division's use of the mails to send notice to the last address furnished to the Division comports with due process. *See Grievance Comm. v. Polur*, 67 F.3d 3, 6 (2d Cir. 1995) (per curiam) (discussing adequacy of use of mails for notice).

Next, we consider whether those members of subclass C whose claims were ACD'd for failure to cooperate were provided with adequate notice that their claims were at risk of being dismissed. In its consideration of this issue, the district court relied exclusively on the Division's "Post-1991 ACD letters," which it found violated due process because, it believed, the letters did not unambiguously notify complainants that they should contact the Division in order to avoid dismissal. *See NOW III*, 189 F.R.D. at 309.

Even assuming the Post-1991 ACD letters were deficient — a question we do not decide — we find that the district court erred by exclusively focusing its due process inquiry on the sufficiency of the notice provided in these letters.[5] As we have already noted, to succeed on its facial challenge NOW must establish that under "no set of circumstances" would the Division's ACD Policy be constitutionally adequate. *Reno v. Flores*, 507 U.S. 292, 301 (1993) (internal

5. Indeed, by doing so, the district court arguably treated NOW's claim as an "as applied" challenge, for which NOW clearly would lack standing. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (holding that an organization has standing to sue on behalf of its members only if, *inter alia*, "neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit.").

quotation marks omitted). That determination simply cannot be made by looking to the Post-1991 ACD Letters alone because the Policy also requires that a Division staff member "make two phone calls to attempt to contact the [non-cooperating] complainant, one during the day, and one after 7:00 PM" before the claim can be ACD'd. The information the Division's staff communicated during those phone calls, taken alone, may have provided the claimants with constitutionally sufficient notice that their discrimination claims were at risk of being dismissed for failure to cooperate. What's more, since this question is plainly fact specific to each claimant, it is not appropriately the subject of a facial challenge.

For the foregoing reasons, we hold that NOW has failed to establish that the Division provided constitutionally deficient notice before it ACD'd the discrimination claims of the members of subclass C.

CONCLUSION

Because no constitutional violation has been shown, the plaintiffs' procedural due process claims are dismissed with prejudice. As a consequence, the district court's order denying the defendants qualified immunity and its award of injunctive and declaratory relief in favor of the plaintiffs are vacated.

We have carefully considered plaintiffs' cross-appeal and find it without merit.

The present panel will retain jurisdiction over any further appeals that may arise in this case.

Each side to bear its own costs of appeal.

Appendix A

MESKILL, *J.*, concurring:

I concur in the result reached and in Chief Judge Walker's treatment of all the issues in this case. I write separately to address plaintiffs' "delay-plus-actual prejudice equals deprivation" theory, which was adopted and found clearly established by the district court and commented upon favorably by Judge Calabresi in his separate opinion.

Chief Judge Walker expresses "deep reservations" about the theory. I agree and would go further. I would hold that the Division's delay in processing a plaintiff's claim could not constitute a deprivation of a constitutionally protected property interest under the Due Process Clause. In support of the "delay-plus-actual prejudice equals deprivation" theory, the plaintiffs and the district court unreasonably stretch existing precedent, while advocating an impermissibly narrow reading of our holding in *Polk v. Kramarsky*, 711 F.2d 505 (2d Cir. 1983), a case that can and should dispose of this action.

A. Logan *and the Unreasonable Delay Cases*

Plaintiffs primarily rely on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), and two of this Court's prior decisions, *Kraebel v. N.Y. City Dep't of Hous. Pres. & Dev.*, 959 F.2d 395 (2d Cir. 1992), and *Isaacs v. Bowen*, 865 F.2d 468 (2d Cir. 1989), to support their argument that delay-plus-actual prejudice equals deprivation.

Appendix A

1. *Logan*

In *Logan*, the Supreme Court framed the issue before it as "whether a State may *terminate* a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure." 455 U.S. at 424 (emphasis added). The plaintiff had filed a cause of action with the Illinois Fair Employment Practices Commission (Commission), which, under Illinois law, had 120 days to convene a factfinding conference. *See id.* The Commission inadvertently scheduled the conference for five days after the statutory deadline. *See id.* at 426. Logan's employer thereafter challenged the Commission's jurisdiction to hear the claim. The Illinois Supreme Court ultimately upheld that challenge, holding that the 120 day period was a jurisdictional requirement. *See id.* at 426-27. This ruling effectively terminated Logan's cause of action without the benefit of a hearing.

The Supreme Court stated that the Illinois statutory scheme, as interpreted and enforced by the state courts, destroyed Logan's ability to have his claim heard. *See id.* at 432 (reasoning that "any other conclusion would allow the State to *destroy* at will virtually any state-created property interest" (emphasis added)); *id.* at 434 (noting that "the deprivation here is *final*" (emphasis added)). The Court concluded that "the State may not *finally destroy* a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Id.* (emphasis added) (footnote omitted). In reaching its conclusion, the Court relied on prior decisions where it had found that deprivations occurred when the state "*terminate[d] every right* which

beneficiaries would otherwise have," *id.* at 429 (emphasis added) (internal quotation marks omitted), "*cut[ ] off* [beneficiaries'] rights," *id.* (quotation marks omitted), "*dismissed*" plaintiff's claims, *id.* (emphasis added), "*den[ied]* potential litigants *use* of established adjudicatory procedures," *id.* (emphasis added), or "*deprive[d]* someone *of . . . access*" to the courts. *Id.* at 430 n.5 (emphasis added). The Court's opinion is replete with references to the total extinguishment or final destruction of an individual's cause of action. There is nothing in the opinion that supports the view that a state's delay in adjudicating an existing cause of action constitutes such an extinguishment or destruction.

Further examination of other Due Process cases decided by the Supreme Court leads to a similar conclusion. *See, e.g., Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 488 (1988) (*Tulsa*) ("The entire purpose and effect of the nonclaim statute is to . . . *forever bar untimely claims[ ]* and . . . the . . . proceedings . . . have *completely extinguished* appellant's claim.") (emphasis added). While it is always possible to cherry-pick broader language from certain Supreme Court decisions, *see, e.g., id.* ("adversely affect"); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) (*Mennonite*) ("drastically diminishes the value"), when placed in context, those same cases reveal that the Court found a deprivation only when faced with a discrete state action that either completely extinguished plaintiff's property interest or drastically reduced the known or measurable value of that interest. *See Tulsa*, 485 U.S. at 488 (nonclaim statute extinguished and "forever bar[red] untimely claims"); *Mennonite*, 462 U.S. at 798 (tax sale "immediately and drastically diminishe[d] the value of th[e] [mortgagee's]

interest"); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 311 (1950) ("The effect of this decree . . . [is] that every right which beneficiaries would otherwise have . . . is sealed and wholly terminated."). In contrast, the plaintiffs' theory would allow claimants to show a deprivation of their interests by the gradual erosion — through the passage of time rather than by any affirmative state action — of their ability to prove their claim.

2. *The Unreasonable Delay Cases*

The district court also relied heavily on the notion that "delay can be so unreasonable as to deny due process, such as when it is inordinately long." *Isaacs*, 865 F.2d at 477; *see also, e.g.*, *Kraebel*, 959 F.2d at 405 ("[I]mplicit in the conferral of an entitlement is a further entitlement, to receive the entitlement within a reasonable time.") (*quoting Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir. 1991)). As the Court's opinion adequately points out, these cases dealt with the adequacy of post-deprivation process, not with whether a deprivation occurred in the first place. *Kraebel* could not be more clear: "[T]he question of the timing of that processing and payment relate *not to her property right*, . . . but to the adequacy of the process she is receiving." 959 F.2d at 405 (emphasis added).

By way of illustration, assume in *Logan* that the Illinois statutory scheme provided that after a 120 day dismissal the claimant was entitled to a hearing. Assume further that the hearing would determine whether the failure to meet the deadline was the claimant's fault or due to the state's negligence, and where the latter was shown, the claimant's

action would be immediately reinstated. I have little doubt that the Supreme Court would have upheld such a scheme. If, however, Illinois took five years to hold the post-dismissal hearing, plaintiff would claim (successfully, I imagine) that the delay was sufficiently egregious to violate the post-deprivation process rule in *Kraebel* and *Isaacs*. But that is not this case. We cannot reach the question in *Kraebel* and *Isaacs* until the plaintiffs first demonstrate that they have been deprived of a property interest.

In his separate opinion, Judge Calabresi cites *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980), for the suggestion that "extraordinary delay" in "the process of governmental decisionmaking" that impairs the use or value of property may be a " 'taking' in the constitutional sense." Notwithstanding the infirmities of applying the Supreme Court's Takings Clause jurisprudence in a Due Process case such as this one, the comparison reveals another fundamental misconception. In the typical Takings Clause case, the government's delay in processing or granting, for example, a zoning permit impairs the owner's use of property. The right to use one's property has no inherent need for governmental interference and undue delay arising out of such interference is rightly actionable. The plaintiffs' property interest here is a cause of action. State, federal or administrative procedures are needed to prosecute such a claim. Stated differently, in the zoning context, the adjudication is a government imposed burden. In a cause of action, the adjudication is a government provided benefit, without which the claimant's cause of action would be worthless. Unfortunately, there are delays, sometimes excessive ones. Neither the federal government, state

governments nor local administrative agencies are immune from delays. In my view, remedying those inefficiencies falls within the state political, rather than the federal judicial, sphere.

In summary, all of the cases relied on by the plaintiffs and the district court and those cited by Judge Calabresi are inapposite to our determination of whether the state deprived the plaintiffs of a property interest.

B. *Polk v. Kramarsky*

While the Supreme Court's Due Process Clause jurisprudence arguably leaves room for the plaintiffs' theory, our decision in *Polk* expressly forecloses any attempt to expand the definition of "deprivation" to encompass the instant claim.

In *Polk*, we answered "the question whether undue delay by a New York state agency in processing a discrimination claim . . . gives rise to . . . a violation of due process." 711 F.2d at 506 (internal citation omitted). We held that it did not. Mr. Polk based his due process claim on the assertion that "the delay in processing his complaint substantially prejudiced the preparation and prosecution of his discrimination action and caused him financial as well as emotional injury." *Id.* at 508. We distinguished *Logan* because Polk's claim, irrespective of any prejudice, was not finally destroyed:

> Here, Polk's right of action has survived, albeit long delayed. *Logan* is therefore distinguishable. As the *Logan* Court opined: "To put it as plainly

> as possible, the State may not *finally destroy* a property interest without first giving the putative owner an opportunity to present his claim of entitlement."

Id. at 509 (citation and footnote omitted). We did not hold that prejudice to a claimant's ability to prove a cause of action, if it could be shown, would constitute a deprivation. Indeed, our express holding states the opposite. *Id.* We specifically held in *Polk* that (1) the Division's delay "violated both the spirit and the letter of [its] procedural provisions," (2) "[a]t no time was Polk — who was proceeding pro se for most of this period — informed by the Division that it could not or would not comply with the State's own time requirements," (3) Polk was not "informed of the interrelationship between the remedies and procedures under New York and federal law," and (4) "the Division did not do its job." *Id.* at 507, 509. We still found no due process violation. In holding otherwise, the district court was "considerably wide of the mark." *See* Majority Op. at 15a.

Accordingly, our decision in *Polk*, in addition to a common sense reading of the Supreme Court's Due Process Clause cases, should deter us from expanding the definition of deprivation to include "actual prejudice."

C. *Plaintiffs' Theory Creates an Unworkable Rule of Law*

Even assuming we had carte blanche to fashion a rule akin to the plaintiffs' theory, we should not. Equating prejudice through delay with the final destruction or extinguishment required for a deprivation would create bad law.

Appendix A

In addition to the practical reasons advanced by Chief Judge Walker, *see* Majority Op. at 16a-19a, I am particularly concerned that it would be impossible to set firm and clear guidelines for determining when prejudice rises to the level of deprivation. The point at which delay equals deprivation would inevitably vary from case to case, making it impossible for the state to set up a procedure for pre- and post-deprivation hearings. Further, such a rule would allow any plaintiff who testifies to actual prejudice to create an issue of fact for trial. As far as I can tell, Judge Calabresi, even only in passing, has thus far refined the plaintiffs' theory into the "un-warned-of-delay-plus-actual-prejudice-inappropriate-circumstances-equals-deprivation" formula. *See* Concurring Op. at 41a. I shudder to think how district courts throughout the country would interpret such an amorphous concept. In all likelihood, those determinations will be highly inconsistent and will come at great expense to state agencies created to help the alleged victims of discrimination.

Today's decision appears to mark the practical end of plaintiffs' theory in this Circuit because Article 78 in New York, and its equivalents in Connecticut and Vermont, provide adequate pre-deprivation due process. However, because the "delay-plus-actual prejudice equals deprivation" formulation, with or without refinements, would be bad law fashioned without regard to precedent, policy or practical sense, I would hammer one more nail in its coffin.[1]

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1. Judge Calabresi admonishes Chief Judge Walker and me for engaging in "unnecessarily broad dicta" and asserts that the issue of whether a deprivation has occurred is not properly before this Court. Concurring Op. at 42a-43a n.4. I fail to see how my advocating an

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Appendix A

CONCLUSION

For the reasons discussed, I would hold that delay in state adjudicative procedures does not constitute a deprivation of a cognizable property interest under the Due Process Clause of the Fourteenth Amendment.

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additional (and I believe firmer) ground for the Court's holding is *dicta*. Also, Judge Calabresi's attempt to sidestep this issue is compromised by the record. The district court expressly held that the state's delay deprived the plaintiffs of a protected property interest and the parties briefed that issue on appeal, extensively discussing each of the cases cited in this opinion. While Judge Calabresi clearly disagrees with the substance of my views on the plaintiffs' theory, he fails to advance, or even cite, any legal support for his blanket attack on my position.

Appendix A

CALABRESI, J., concurring:

I concur in the court's holding and in the reasoning needed to support that holding. I also join all of the court's opinion except Part I(B), which discusses both qualified immunity and whether a claim of delay plus actual prejudice is sufficient to allege a deprivation of property cognizable under the due process clause. I decline to join this portion of the opinion because our holding, in Part I(C), fully disposes of the issue before us and renders Part I(B) unnecessarily broad dicta. Given the conclusion that the availability of Article 78 proceedings means that the plaintiffs have received all the process that they are due, it is, I think, undesirable (a) to reach out to say that, because the plaintiffs' rights were not clearly established when the defendants acted, the defendants enjoy qualified immunity and (b) to reach out yet further to suggest, even tentatively, that the plaintiffs were not in fact deprived of a protected property interest at all. I write separately to underscore the fact, readily conceded in the court's opinion, that all such comments are dicta,[1] and to

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1. The opinion twice notes that the bulk of the discussion in Part I(B) is not necessary to deciding the case before us. Thus, the opinion states that,

> [r]egardless of whether a property deprivation occurred, it is plain that the members of subclasses A and B were afforded procedures [in the form of New York State Article 78 suits] that satisfied the Fourteenth Amendment's due process requirement.

See Majority Op. at 19a. And, presumably in light of this recognition, the opinion makes clear that it

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express my view that these questions are best left to another day. *See United States v. U.S. Gypsum, Co.*, 333 U.S. 364, 402 (1948) (Frankfurter, J., concurring) ("[T]he Court confessedly deals with an issue that 'need not be decided to dispose of this case.' Deliberate dicta, I had supposed, should be deliberately avoided.").

In Part I(B), the majority's opinion expresses "deep reservations" about the notion that delay to a plaintiff's legal claim plus actual prejudice to that claim can constitute a property deprivation that triggers due process protections. In reaching its conclusion, the majority speculates about issues of law and fact which are both much closer and much harder than the opinion suggests. I believe that were the issues properly before a panel of this court, we might well conclude that unwarned-of delay plus actual prejudice could in appropriate circumstances deprive a plaintiff of a property interest that triggers due process rights. *Compare Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (holding that a violation of due process occurred when an administrative error caused the Illinois Fair Employment Practices Commission to hear a plaintiff's antidiscrimination claim after the expiration of a statutorily mandated limitations

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> need not finally resolve whether actual prejudice to a cause of action following a period of extreme government delay is sufficient to make out a property deprivation, or whether instead the government action must flatly extinguish the cause of action before a property deprivation can be made out.

See Majority Op. at 19a.

period, with the result that the delay finally and irrevocably extinguished the plaintiff's claim in every forum),[2] *with Polk v. Kramarsky*, 711 F.2d 505, 509 (2d Cir. 1983) (finding that no violation of due process transpired when an administrative delay merely deprived a plaintiff of a particular *forum* for pursuing an antidiscrimination claim and the plaintiff made no plausible showing that this delay prejudiced the assertion of the claim itself, given that the claim remained fully viable in some other forum).[3] Accordingly, I cannot join the majority's attempt to preclude through its advisory comments a full discussion of issues which can only be adequately treated if and when they are squarely presented by a future case.[4]

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2. The Supreme Court noted that the plaintiff might have been able to seek a post-termination remedy through an independent State tort action, but expressly held that this possibility did not provide the plaintiff with constitutionally adequate process. *Id.* at 346-37.

3. *Cf. Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 488 (1988); *Kraebel v. New York City Dep't of Hous. Pres. and Dev.*, 959 F.2d 395, 405 (2d Cir. 1992); *Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir. 1989). In an analogous area of constitutional law, eminent domain jurisprudence, the Supreme Court has also suggested that although "mere fluctuations" in property value during an unsuccessful condemnation proceeding are simply "incidents of ownership," government action that causes "extraordinary delay" in "the process of governmental decisionmaking" may constitute "a 'taking' in the constitutional sense." *Agins v. Tiburon*, 447 U.S. 255, 263 n.9 (1980).

4. Judge Meskill's concurring opinion goes beyond the majority in its determination to decide what is not before this court. In doing

(Cont'd)

I believe that the majority opinion's discussion of qualified immunity in Part I(B)(1) is also unnecessary, and thus as much dicta as its discussion of delay plus actual prejudice in Part I(B)(2). Unlike the court's comments on the delay plus actual prejudice theory, however, qualified immunity could have been the basis of a narrower-and hence generally more suitable — resolution of this case. Under this approach, we would have begun by rejecting the plaintiffs' claims for *money damages* on the ground of qualified immunity. In doing so, we would have observed that the plaintiff's delay plus actual prejudice theory has not been clearly established, even to date. Moreover, although the Supreme Court has said, in *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998), that courts of appeals confronted with a qualified immunity defense should ordinarily establish underlying rights before ruling on qualified immunity, we have previously read this mandate as not applying in certain "appropriate cases." *Horne v.*

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so, it reads narrowly cases it does not like, ignores language damaging to its position that is found in those cases, and instead emphasizes language — that could appropriately be described as dicta — in cases it favors. It then seeks to define as unworkable a "formula" that has hardly been presented, let alone refined into a holding that might guide lower courts. I think it is unwise to engage, in dicta, in a discussion of whether what past opinions have said is dicta or holding. And I also do not wish to argue in the abstract about the feasability of holdings that a court might someday make in appropriate cases. It is enough to say that Judge Meskill's reading of the cases leaves me unconvinced, and hence, all the more determined to leave any analysis of these cases, and of the practicality of rules that might be derived from them, to the time, if ever, when a case or controversy properly presents the issues to us.

Coughlin, 191 F.3d 244, 248 (2d Cir. 1999). And we would have explained why this is such a case.[5]

We would then have rejected the plaintiffs' claim for *injunctive relief* on the ground that a plaintiff seeking an injunction in federal court must demonstrate that there is a real danger that the act she seeks to have enjoined will actually take place. This, we would have noted, requires more than the mere possibility or fear that the action will occur. *See, e.g., Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975). Finally, we would have pointed out that the very fact that the defendants in this case enjoy qualified immunity presupposes a finding that defendants have not, up to this point, committed any acts that they reasonably believed to be unconstitutional. Because federal courts should not enjoin state officials' future conduct, absent specific evidence that these officials have flouted or are likely to flout reasonably discernable constitutional commands, and because there is no reason to think that state officials will not, in the future, and on their own, warn claimants of the delays inherent in the administrative process and thereby eliminate any undue prejudice that such delays might otherwise cause, no current basis for an injunction would exist.

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5. For example, reaching the substance of the plaintiffs' delay plus actual prejudice claim requires addressing difficult questions of constitutional law. Moreover, since persons in the plaintiffs' position will normally seek, as the plaintiffs themselves have sought, injunctive relief, "[t]here is no reason to believe that the [delay plus actual prejudice theory] will repeatedly, or over substantial time, escape judicial review in federal court by reason of qualified immunity." *Horne*, 191 F.3d at 250. Under such circumstances, the *Sacramento* suggestion loses much of its force.

Appendix A

I repeat that none of this discussion of the effects of a finding of qualified immunity is needed to decide this case. I outline it only to point out that, on this basis, too, reaching the merits of the plaintiffs' delay plus actual prejudice theory is unnecessary. And this fact makes the majority's dicta with respect to the latter theory yet more troublesome. Comments on constitutional questions, and, in particular, comments on difficult ones, should generally be avoided by courts where alternative grounds for decision are available. *Cf. Hutchinson v. Proxmire*, 443 U.S. 111, 122 (1979). And they should even more likely be avoided when, as here, there exist not one but two relatively narrow grounds that completely decide the case.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 26, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 7146 (RLC)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al., on behalf of themselves and their members, and all others similarly situated, and Clarice Seegars, et al., on behalf of herself and all others similarly situated,

Plaintiffs-Intervenors,

– against –

GEORGE W. PATAKI, individually and as Governor of the State of New York and EDWARD MERCADO, individually and as Commissioner of the Division of Human Rights of the Executive Department of New York State,

Defendants.

OPINION

* * *

ROBERT L. CARTER, District Judge

Plaintiffs-Intervenors ("plaintiffs") seek a declaratory judgment and injunctive relief based on alleged constitutional violations by defendants in the processing of discrimination complaints filed with the New York State Division of Human Rights (the "Division").

Appendix B

I. Background

A. The Statute Involved

New York's Human Rights Law, promulgated in 1945, makes the right to obtain housing and employment free of discrimination a civil right. N.Y. Exec. Law § 126 (the "HRL"). The statute, pursuant to § 296, proscribes discrimination based on, *inter alia*, race, color, creed, national origin, gender, age, disability, pregnancy, in employment, housing, licensing, labor organization and apprentice training program membership, employment agency referrals, public accommodations, educational institutions, public services, and credit transactions. 18 N.Y. Exec. L. § 296.

The Division was established and empowered to hear, investigate, prosecute, and adjudicate claims of discrimination outlawed by the statute. Where such claims had been validated through the agency process, the Division was empowered, through its Commissioner, to provide vindicating remediation sufficient to make the claimant whole. 18 N.Y. Exec. L. § 297.

Manifesting concern that the Division establish a process that moved matters from initiation to conclusion with reasonable timeliness, specific time constraints were set forth in the statute, as follows: Once a claim of discrimination has been filed, the Division is required to promptly serve a copy on the respondent and to undertake a prompt investigation of the claim. 18 N.Y. Exec. L. § 297.2.a. The Division must decide within 180 days after the claim is filed whether there is probable cause to believe that the claim of discrimination

is valid. (*Id.*) If the Division makes a probable cause determination, it must, within 270 days after the filing of the complaint, issue a notice requiring the respondent to answer and to appear at a public hearing. 18 N.Y. Exec. L. § 297.4.a. Within 180 days after commencement of a hearing, a decision and an order must be issued. 18 N.Y. Exec. L. § 297.4.c.

A Division attorney will prosecute all claims resulting in probable cause determinations. 18 N.Y. Exec. L. § 297.4.a.(i). The Division must ensure compliance with its remedial orders, and when compliance is not effectuated, it must seek to enforce the order within one year of its issuance. 18 N.Y. Exec. L. § 297.7. In evident recognition of the uniqueness of housing, the timetable for probable cause determinations with respect to housing discrimination was shortened from 180 to 100 days from the filing of the claim. 18 N.Y. Exec. L. § 297.2.b. The statute also explicitly declares that its provisions are to be construed liberally in order to accomplish the purposes of the HRL. 18 N.Y. Exec. L. § 300.

B. The Parties and Relief Sought

Plaintiffs, consisting of various individuals and organizations, have instituted and intervened in this 42 U.S.C. § 1983 proceeding, which was brought as a class action pursuant to Rule 23, F.R. Civ. P., in order to challenge the administrative practices and procedures of the Division in its handling and processing of claims of discrimination. Plaintiffs allege that their Fourteenth Amendment rights to due process and equal protection have been infringed upon by the protracted administrative delays to which their claims

have been subjected, and that the institution of certain intake rules (the "1995 Intake Rules"), pursuant to which the Division refused to accept complaints alleging illegal and unconstitutional discrimination, violates the Supremacy Clause.

Enforcement of the new intake rules was preliminarily enjoined by the court. Plaintiffs have moved for an order rendering the preliminary injunction permanent, which motion will be disposed of as part of the instant determination.

Plaintiff National Organization for Women, New York State, Inc., ("NOW"), is a membership organization incorporated in the State of New York, consisting of 24 chapters, with a total membership of 18,000 to 20,000. Plaintiff New York City Chapter of NOW, one of the 24 chapters, is located in New York City. Plaintiff Westchester County Chapter NOW is a chapter in the indicated county, with offices in White Plains, New York.

Plaintiff Clarice Seegers filed a complaint of race, gender, and disability-based discrimination against her employer with the Division on April 13, 1990. Her complaint did not get a public hearing until roughly seven years after it was filed, and the complaint was still pending at the time of trial.

Plaintiff Jane Doe is the administratrix of the estate of John Doe, who filed a disability discrimination complaint with the Division on August 29, 1990. John Doe, the main witness in the case, died in September, 1991, before any meaningful investigation had been commenced and before a probable cause determination had been made.

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Plaintiff Bernadette Thomas initiated a charge of race discrimination against her employer with the United States Equal Employment Opportunity Commission ("EEOC"). The matter was referred to the Division on March 2, 1987. In January, 1996, Thomas requested and received an administrative convenience dismissal ("ACD") of her complaint in order to prosecute her claim in this court. At the time she requested and received the ACD, no probable cause determination had been made and no public hearing had been held or scheduled, despite the fact that her complaint had been pending before the Division for over eight years.

Plaintiff Dellie Britt filed his complaint of race discrimination against his employer with the Division on October 1, 1985. The complaint, as of the commencement of this litigation, was still pending in the Division without a final administrative determination.

Michael Campbell filed a complaint of housing discrimination in September, 1992. As of July, 1997, no hearing had been held and no determination had been made. In the interim, he had been diagnosed with an inoperable brain illness making death imminent, and, fearful that death would come before his complaint was heard, he settled his case in July, 1997.

The defendants include Margarita Rosa, Commissioner of the Division from 1990 to January, 1995. Rosa, prior to being named Commissioner, had served as Executive Deputy Commissioner and as General Counsel of the Division. As the chief executive officer of the Division from 1990 to 1995, Rosa had primary responsibility for administering the HRL.

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Defendant Edward Mercado was Rosa's immediate successor. He took office as Commissioner in October, 1995, and, as such, had primary responsibility for administering the HRL from 1995 to the present.

Defendant Mario Cuomo was Governor of the State of New York from January 1, 1983, to December 31, 1994. As the state's chief executive, Governor Cuomo was responsible for management of all departments and agencies statutorily authorized and funded by the state during his twelve years in office.

Defendant George Pataki succeeded Governor Cuomo as Governor of the State of New York on January 1, 1995, and continues in that position at present. As such he has been responsible since January 1, 1995, for management of all departments and agencies funded by the State.

II. History of the Litigation

This litigation was instituted as a class action on October 15, 1993, by Robert Louis Sanstrom. On July 24, 1995, Jane Doe, Bernadette Thomas, Dellie Britt, and Clarice Seegers were allowed to intervene as individual plaintiff-intervenors and NOW (New York State, New York City, and Westchester County Chapters) were allowed to intervene in a representational capacity.

A. The Class Defined

The class action was provisionally defined as consisting of all persons who, since October 15, 1990, had filed or will

file complaints of discrimination with the Division and whose complaints have not been, or will not be, finally administratively adjudicated or otherwise substantively resolved within three years of the date of the filing of the complaint. The provisional class was subsequently further defined to include three subclasses:

a) all persons who have been, are, or will be subject to dismissal of their complaints because defendants Rosa and Mercado have taken longer than three years from the date the complaint was filed to render a final determination (hereinafter "subclass A"); and

b) all persons who have been, are, or may be subject to a reduction in the monetary relief awarded, either by order of Rosa, Mercado, or by a court because defendants Rosa and Mercado have taken longer than three years from the date the complaint was filed to render a final administrative determination (hereinafter "subclass B"); and

c) on April 3, 1998, a third subclass was added comprised of all persons who have been, are, or may be subject to ACD dismissals because the Division was either unable to locate complainants or had determined that the complainants had failed to cooperate and that their complaints had been pending for more than one year (hereinafter "subclass C").

On April 3, 1998, the class was allowed to amend the complaint to add claims against Governor Pataki and Commissioner Mercado in their personal capacities for permitting the delays in processing complaints before the

Division. In addition, the class was also allowed to sue Mercado in his personal capacity for the institution and implementation of revised rules of practice relative to the Division's intake procedures.

NOW's application for preliminary injunctive relief was heard before Magistrate Judge James Francis IV on May 15, and May 20, 1997. On June 17, 1997, Judge Francis issued his Report and Recommendation proposing that the enforcement of the new intake procedures be preliminarily enjoined. In an opinion filed on April 3, 1998, the court accepted and adopted the Report and Recommendation as the order of the court. *See NOW v. Cuomo*, 182 F.R.D. 30 (S.D.N.Y. 1998) (Carter, J.) (hereinafter "*NOW I*"). The court was thereafter advised that Commissioner Mercado had immediately directed Division to cease using the new intake procedures and had begun the process of repealing them. (Tr. at 760.)

On July 16, 1997, plaintiffs moved to consolidate the proceedings on their motion for preliminary injunctive relief with the trial on the merits, thereby converting the preliminary injunction into a permanent injunction.

Defendants moved to dismiss plaintiffs' damages claims based on their claim of qualified immunity. That motion was granted in part and denied in part by an opinion and order entered on July 24, 1998. *See NOW v. Cuomo*, 14 F. Supp.2d 424 (S.D.N.Y. 1998) (hereinafter "*NOW II*"). Appeal of the court's *NOW II* ruling is pending before the Second Circuit.

By order dated August 4, 1998, the court bifurcated the proceedings, stayed the trial concerning defendants'

individual liability for damages pending appeal of the court's NOW II ruling, and ordered trial to proceed only on plaintiffs' claims for declaratory and injunctive relief. The trial for declaratory and injunctive relief commenced on August 11, 1998, consumed seven trial days, and concluded on August 26, 1998. Post-trial briefs and memoranda were duly filed in November, 1998.

B. The Administrative Proceedings

The Division is the agency established by the legislature to enforce the HRL. Its primary purpose is "to encourage programs designed to insure . . . equal opportunity to participate fully in the economic, cultural and intellectual life of the state; to encourage and promote the development and execution by all persons within the state of such state programs; [and] to eliminate and prevent discrimination . . . ." 18 N.Y. Exec. L. § 290. Its chief executive officer is the Commissioner, who is empowered to make policies and recommendations to aid the purposes of the HRL, to receive, investigate and pass on claims of discrimination, to initiate investigations and studies and file complaints to further the policies of the HRL, to create advisory councils, to develop human rights plans and issue publications to minimize or eliminate discrimination, to alleviate conflict among groups, and to provide technical assistance in furtherance of the HRL.

There are nine regional Division offices and two special offices — the Office of AIDS Discrimination Issues and the Office of Sexual Harassment Issues. (Tr. at 409-10). The chief executive of these regional offices is the Deputy Commissioner for Regional Affairs. The current Deputy is

John Lind. (Tr. at 393). The regional offices receive complaints, conduct investigations, and issue probable cause determinations (*i.e.*, determinations that there is cause to believe that discrimination has occurred) and no probable cause determinations.

Complaints of discrimination are filed in the regional offices and are received by officials called Human Rights Specialists ("HRS") 1s and 11s. HRS 1s perform intake functions: they take complaints, look them over, advise complainants about how to proceed, and help get the complaint in proper form. Once a complaint is accepted, HRS 1s conduct an initial investigation. HRS 11s are supervisors: they review complaints to insure they meet the agency's requirements for processing, assist HRS 1s in developing their investigations, and aid in probable cause determinations. (Tr. at 703.)

Once a complaint is approved as being proper in form and substance, a copy is sent to the respondent with a request for a response and relevant documents. After the response is received, an HRS 11 reviews the file, drafts a preliminary investigation plan, and assigns an HRS 1 to undertake an investigation. (Tr. at 400). In the course of the investigation, the parties and witnesses are examined and relevant documents are requested and reviewed. (Tr. at 401). Sometimes a field trip to the site of the claimed infraction is made, and most frequently the parties are examined in a two party fact finding conference. (Tr. at 401-02). Whatever is done is written up as an investigation report. (*Id.*) An HRS 11 reviews the report and recommends a probable cause determination or a no probable cause determination. (Tr. at 402).

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As the complaint proceeds through the various phases of the Division process, the Division continuously attempts to assist the parties in settling, conciliating or mediating their differences. (Tr. at 405-06, 765-66, 767-70). If the parties opt for mediation, the Division can contract the matter to a mediation agency or undertake the task itself. (Tr. at 767-70).

The report and recommendation of HRS 11s for a probable or no probable cause determination is sent to the Regional Director for review. If the probable cause recommendation is approved, the Director issues an order to that effect which is sent to the parties. (Tr. at 743). If the Regional Director's order is a no probable cause determination, the parties are informed of the complainant's right to seek judicial review of that determination in the New York State Supreme Court within 60 days. (Tr. at 744, 747). On the expiration of the 60 day period, the file goes to the Division's central filing unit as a final determination, provided no appeal is taken. (Tr. at 403). If the complainant appeals within the 60 day period, the case then proceeds through the judicial process. If the case has also been filed with the EEOC, the complainant is advised of the right to seek EEOC review of the Division's no probable cause determination. (Tr. at 744, 747-49).

After a probable cause determination, the matter goes to the probable cause review unit which reviews the record to make certain it is in proper form and that it supports the probable cause finding. (Tr. at 408, 750-51). The unit may approve the determination, in which event the case leaves regional jurisdiction and goes to the hearing unit for

calendaring. (Tr. at 408). It may also remand the case to the Regional Director or dismiss the complaint. (Tr. at 750-51).

Complaints are dismissed or remanded only if more information is deemed needed or if the law has been misapplied. (Tr. at 752). In the latter instance, the review unit may itself correct the error. (Tr. at 752-53). During the year prior to trial (*i.e.*, 1997-98), only one complaint was dismissed by the unit and only five percent were remanded for additional information. (Tr. at 750-51).

The probable cause review unit does not normally review a no probable cause determination. There is no standardized or systematic review of these findings. The Deputy Commissioner testified that at his request the unit will look at a matter, but this occurs only on occasion (Tr. at 409), so that as a general rule a no probable cause determination constitutes a final Division order.

Once a case reaches the hearing unit, it is scheduled for a pre-hearing conference with an Administrative Law Judge ("ALJ") for settlement discussions only (Tr. at 260-61, 806); if settlement fails, the ALJ assigned to the case for settlement will not preside over the public hearing. (*Id.*) If the settlement conference does not succeed, a public hearing must be scheduled. The public hearing, however, is immediately preceded by a preliminary conference which is presided over by the ALJ who will conduct the public hearing. (Tr. at 261, 807). At the preliminary conference documents, witness lists, and the order of witnesses are agreed upon and exchanged, etc., and, if possible, the dates of the hearing are set. (Tr. at 262-63). The ALJ also decides pre-hearing motions to amend

or dismiss the complaint, for summary judgment, and other such motions of substance or procedure. (Tr. at 822-23). At hearings, complainants are represented by Division counsel and/or private counsel (Tr. at 819), and respondents usually have their own counsel. (Tr. at 821).

Priority in scheduling for public hearings has been accorded to the oldest cases based on the date complaints were filed. However, the backlog is such that the chief ALJ simultaneously is seeking to calendar some of the newer cases while eliminating the backlog. (Tr. at 809). Division policy is to expedite AIDS cases for public hearing (Tr. at 277, 810), as well as those of complainants with other forms of terminal illnesses or who are of advanced age. (*Id.*)

At the conclusion of a hearing, the ALJ prepares a recommended order. (Tr. at 265). The case file, including the transcript of the hearing and proposed order, is then sent to the order preparation unit, headed by the adjudication counsel. (Tr. at 265). The adjudication counsel prepares the final order for the Commissioner's signature. The Commissioner is authorized to either adopt the ALJ's recommended order, modify it, or reverse or remand the case. (Tr. at 265-267).

The administrative processes of the Division are not per se at issue in this litigation, except that plaintiffs question a number of ACD terminations for "failure to locate" and "failure to cooperate" in which the ACD occurred without the Division following the steps that its rules establish are prerequisite to a proper administrative convenience dismissal. Additionally, plaintiffs seek redress for claimants whose

claims were improperly ACD'd because the respondents they named declared bankruptcy. Plaintiffs also challenge the Division's dismissal of cases under its "new" intake rules, promulgated in November, 1995, which the court ultimately enjoined. Separate from these administrative challenges, the basic thrust of this litigation focuses on the harm caused to the class because of the protracted delays in the processing of class members' complaints.

C. Summary of the Trial Testimony and Evidence

At the trial, plaintiffs established, through the testimony of individual class representatives, various officials of the Division, and expert witnesses, the length of time required to process a claim from intake to final determination. Plaintiffs sought to show that the protracted delays in processing claims before the Division compromised the successful prosecution of class members' complaints due to the loss of critical evidence and documents, and to witnesses' loss of memory. Plaintiffs also sought to show that the protracted delays had adversely impacted members of the class both emotionally and financially.

Defendants did not contest that protracted delay in processing claims before the Division occurs. Defendants rather sought to show that the processing delays have had at best a minimal adverse impact on the class, that the time to proceed from intake to final determination was now being shortened, and that a concentrated effort was underway to eliminate the Division's backlog. In addition, defendants were permitted to introduce evidence of the Division's determinations which were beneficial to the class during the period embraced by the litigation.

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1. Evidence at Trial

Defendants provided plaintiffs with a database of some 48,000 cases closed between October 15, 1990, and April 10, 1998, (Tr. at 46-47, 57; PE 1 ¶ 13), *i.e.*, cases where a final favorable or unfavorable disposition had been made.[1] In examining this data, plaintiffs' statistician Robert Faust found that of 43,227 cases the Division closed in this time frame (PE 1 ¶ 29), 34% of that total took more than three years from filing to closing. (Tr. at 71). The mean time for processing was 921 days (Tr. at 72; PE 1 ¶ 29), somewhat in excess of 2 ½ years. At the Division's Regional level, Faust found that 31% of the probable cause and no probable cause determinations took more than three years. (Tr. at 73). The mean time the Regional Office needed for probable cause determinations was 817 days and for no probable cause determinations was 856 days. (PE 1 ¶ 30(b) and (c)).

Of some 3,947 probable cause determinations resulting in a Commissioner's order, 75% were unresolved after three years, 50% were unresolved after five years, 28% were unresolved after seven years, and 14% remained without a final determination after nine years; the mean measured in days in this category was 2,005 days or 5.5 years. (PE 1 ¶ 34). In 94% of the cases where the probable cause determination was affirmed by the Commissioner's order, the time from filing of the complaint to the final order was more than three years. It also took more than three years in 96% of the cases which resulted in a Commissioner's order dismissing the complaint. (Tr. at 73; PE 1 ¶ 30(e) & (f)). The

1. PE is plaintiffs' exhibit; DE is defendants' exhibit; and JE is joint exhibit.

mean number of days from filing to the affirming order was 2,701 days or 7.4 years, and 2,774 days or 7.6 years from filing to the issuance of an order dismissing the case. (*Id.*)

In this database of 48,000 closed cases, Faust analyzed 5,125 cases dismissed for administrative convenience because of failure to locate, failure to cooperate or bankruptcy. At the regional level, 57% of the cases ACD'd for failure to locate, 44% of the cases ACD'd for failure to cooperate, and 45% of the cases ACD'd for bankruptcy took more than three years from intake to ACD. (Tr. at 68; PE 1 ¶¶ 23-25). At the hearing level, 84% of the cases ACD'd for failure to locate, 94% of the cases ACD'd for failure to cooperate and 82% of the cases ACD'd for bankruptcy took more than three years. (Tr. at 69; PE 1 ¶¶ 26-28). Of the 5,125 cases ACD'd in the database of 48,000 closed cases, 1,271 were ACD'd in 1995, 146 in 1996, 123 in 1997, and 29 as of April 30, 1998. (Tr. at 83).

Apart from the database, Faust was given and reviewed 1,206 files. Of these files, 490 had been ACD'd in 1995, 30 in 1996, and 23 in 1997. (Tr. at 81-82). Division policy required that before a case was ACD'd for failure to locate, the Division would make two telephone calls to the complainant and write two letters, the second letter being certified. If the Division failed to contact the individual the case would be ACD'd for failure to locate. Faust found, however, that this procedure was not always followed. In 20% of the 1,206 cases he reviewed there was no evidence of a phone call being made. In 4% of the cases there was no evidence of either a phone call being made or a letter being sent. (Tr. at 59-60). In extrapolating this data from the 1,206

files to the 5,125 cases ACD'd in the data base, Faust concluded that in 908 cases no phone call was made or no letter sent, and in 182 cases neither a phone call nor a letter preceded dismissal. (Tr. at 61).

The chief ALJ testified that "[g]enerally, according to our rules, once a hearing starts . . . we do not dismiss the cases based on administrative convenience. So at the hearing, we hardly ever dismiss cases using that method." (Tr. at 825-26). Such dismissals do occur, however, when the complainant fails to appear at the scheduled hearing and is sent a notice but still cannot be contacted. A recommended order for an ACD in such cases is prepared for the Commissioner's signature. If the claimant responds "to the recommended order to the commissioner", the latter will remand the case back to the ALJ to proceed with the hearing. (Tr. at 826).

In the course of the litigation a new policy was put into effect. Deputy Commissioner John Lind testified that, under this new policy, an ACD for failure to cooperate was to be issued only when a complainant had evidence central to a case and was not forthcoming. (Tr. at 770-798). Lind testified that he authored this new policy and that it had been orally communicated to all Division personnel. At the time of trial it had not been reduced to writing and the Division's Manual, which sets forth its procedures and practices, had not been changed. (Tr. at 784). When a case is ACD'd for failure to locate or cooperate, a complainant may have the case reopened. However, no notice is currently given to parties of such right, nor was any notice given in prior administrations, and there is nothing in the Division Manual on this issue. (Tr. at 780-90).

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Some 2,448 complaints were not filed because the 1995 Intake Rules allowed Division personnel to refuse to accept complaints for filing even though the complaints were jurisdictionally correct and timely. The 1995 Intake Rules were enjoined by the court and the Division is undertaking to allow those complainants who were turned away to refile. At present, even when the complaint is not timely, the complainant is so advised and the case accepted if complainant insists. Currently, as it was in the preceding era, no notice is given of the right to reopen a case when the case has been ACD'd for failure to locate or cooperate, and there has been no change in the Division's booklet outlining Division practices for public information.

More recent data shows improvement. As of July 31, 1998, there were some 6,159 cases pending at the regional level. Excluding backlogged cases (*i.e.*, cases pending for two years or more), the average time lag between intake and cause determination, either probable or no probable cause, is now 21 months. (Tr. at 410, 740). The backlogged cases take 34 months. (Tr. at 490).

Lorraine Campbell, the Director of the Case Control and Statistical Information Unit, gave testimony describing the number of "favorable outcomes" in each regional office for each year between 1990 and 1998. "Favorable outcomes" were defined as probable cause determinations ending in settlement, cash award, or withdrawal with agreed benefits to complainant. The Division's "favorable outcome" data consisted of three categories: the number of probable cause determinations in each year, cases in which cash benefits were awarded, and cases with favorable outcomes and non-cash

benefits. These categories overlap; benefitted parties may have received more than one kind of relief. Therefore, the reported number of recipients of each kind of relief do not add up to the total number of favorable outcomes for a given year.

Campbell prepared DE C for the case which documents most of the favorable outcomes for 1990-1993, and all such outcomes for 1993-1998. In 1990, there were 1,847 favorable outcomes: 504 probable cause determinations, 417 cash benefits, and 906 non-cash benefits. The cash awards in 1990 totaled $4,120. In 1991, there were 2,165 favorable outcomes: 1,002 probable cause determinations, 552 cash benefits, and 591 non-cash benefits. The cash award total in 1991 was $4,529,273. In 1992, there were 2,290 favorable outcomes: 1,202 probable cause determinations, 603 cash awards, and 493 non-cash benefits. The cash award total in 1992 was $6,395,963. In 1993, there were 2,031 favorable outcomes: 951 probable cause determinations, 620 cash awards and 566 non-cash benefits. The 1993, cash award total was $5,348,550. In 1994, there were 1,934 favorable outcomes: 734 probable cause determinations, 728 cash awards and 630 non-cash benefits. The cash award total in 1994, was $5,327,725. In 1995, there were 1,851 favorable outcomes: 690 probable cause determinations, 720 cash awards and 630 non-cash benefits. The 1995 cash award total was $8,178,974. In 1996, there were 1,475 favorable outcomes: 313 probable cause determinations, 775 cash awards and 552 non-cash benefits. The 1996 cash award total was $5,099,824. In 1997, there were 1,426 favorable outcomes. The 1997 cash award total was $5,388,330. From January 1, 1998, to July 31, 1998, there have been 913 favorable outcomes: 260 probable cause

determinations, 455 cash awards and 331 non-cash benefits. The cash awards total was $3,601,238. (Tr. at 876-78; DE C and DE OO).

As of July 31, 1998, some 2,745 cases are pending at the hearing level, the same number on hand since March 31, 1997. (Tr. at 271-72; PE 52). It currently takes between four and five years, on average, for a case to be calendared for a hearing after it reaches the hearing unit. (Tr. at 283). The unit, according to its Chief ALJ Denise Washington, is now focusing on calendaring cases filed through 1989, absent significant circumstances. (Tr. at 282). There are approximately 500 cases pending with an intake date in the 1980s, and the Chief ALJ testified: "[i]t is my priority to get these cases on the calendar [for] a public hearing and complete it before the year 2000." (Tr. at 282-83). With a current staff of eight full-time ALJs and five on a per diem basis (two on call regularly and three on an "as available" basis) (Tr. at 273-74), the backlog of 500 cases pending from the 1980s cannot be disposed of before the year 2000. (Tr. at 283). She also testified that a staff of 25 to 30 ALJs would be needed for the staff to have a manageable case load, which she set at 100 cases per ALJ. (*Id.*)

A number of witnesses testified concerning the impact the delay in processing their claims had on them personally and on their current ability to successfully prosecute their grievances.

Robert High filed a complaint on February 23, 1990, alleging discrimination based on race and age, and alleging retaliation. High testified that he and his attorney made efforts

to secure the status of his case from Division officials without success. (Tr. at 118). In a letter to the Division dated August 6, 1997, (PE 13), High writes that in the seven and more years his case has been pending he and his attorney have phoned or written the Division 87 times. In February, 1992, because there had been no movement on the case, High requested and obtained an ACD to process his case in court. In June, 1992, the Division and respondent sought and obtained an order from the New York State Supreme Court (Queens County) remanding the case back to the Division. (Tr. at 293). In December, 1997, a probable cause determination was made (Tr. at 120, 294), and a preliminary conference was scheduled for August, 1998, and then adjourned to September 18, 1998. (Tr. at 121). It is not clear in what status High's case is presently pending before the Division. It is not clear from the record whether the scheduled September preliminary conference is a preliminary settlement conference — in which resolution is the primary focus — or is in effect a pretrial conference in which the parties prepare for a public hearing which the assigned ALJ calendars. In any event, as of the time of trial, High's case had just reached the hearing level eight years after being filed.

High testified that he originally intended to call twenty-three witnesses but now only three could be located. (Tr. at 124). He could still remember, despite the 8 ½ year interval, some of the facts and dates, but explained that "a lot of things about my case I can't recall, especially the witnesses that I intended to call and some of the racial comments that were made. . . ." (Tr. at 123-24; PE 13, 14).

High testified that the delay in resolving his complaint had meant that he was not reinstated and both his

unemployment and reduced income had caused great financial hardship to him and his family, especially given that he is a single parent with four children. (PE 126-29). He also testified that this experience had caused him to lose faith in the system, lowered his self-esteem and caused severe depression requiring medication. (Tr. at 124, 126-27).

Henri McNulty filed a race and age discrimination claim on November 29, 1989. (Tr. at 214). He had been employed at Columbia University for 35 years before his termination. (Tr. at 215). John Lind, Regional Director at the time, advised McNulty when he filed his complaint that it would take a year to reach a resolution. (Tr. at 215-16). In October, 1993, McNulty was sent a 33-day letter which could have resulted in a dismissal of his case if it was not responded to, even though there had been no response from the University to a November 29, 1989 request. (JE 4). In 1994, McNulty, who had been diagnosed with prostate cancer, told the Division that he "would like to have this case settled before [he] died." (Tr. at 218).

McNulty testified that the nine-year delay in processing his claim had adversely affected his ability to prove his case. He now gets confused after reading all the documents in the case, finds it difficult to concentrate on the case (Tr. at 221), and has no one to call upon to help him prove his case. (Tr. at 224). He cannot sleep well at night, wonders why his case has not been resolved, and has lost considerable weight waiting for his case to be heard. (Tr. at 222).

Dellie Britt filed his complaint on October 1, 1985. (Tr. at 358). A probable cause determination was made on

September 4, 1992. A conciliation conference was held on November 25, 1991, at which time Britt believed his employer had agreed to settle for either $12,000 or $14,000. (Tr. at 384). However, Britt never received any funds. (Tr. at 368-69, 383-84). The conciliation agreement introduced in evidence as JE 6F (Tr. at 385), provides in ¶5 that the Division deliver the settlement check to Britt after he signed the agreement, which he did on May 4, 1992. (Tr. at 385-86). The Division failed to bring the matter to conclusion by securing the check and delivering it to Britt. On November 14, 1995, the Division stayed proceedings in the case because the respondent had filed a petition in bankruptcy. (Tr. at 388; JE 6G). Britt filed a proof of claim in the bankruptcy proceedings on March 14, 1996.

In the interim, one of Britt's witnesses has died, and he does not know how to reach the other three he intended to rely on to prove his case. (Tr. at 370). Britt testified that he does not remember "a lot of the evidence" at this time (Tr. at 371), and that he was also suffering stress because he was jobless and unable to provide for his family. (Tr. at 374).

Piper Lutbak filed her complaint of sexual harassment in June, 1990. (Tr. at 226). In July, 1991, there was a probable cause determination, but her case proceeded no further. The only communication from the Division was a letter advising her that she could arbitrate her claims if she wished. (Tr. at 237). In December, 1996, she hired an attorney and in March, 1997, a prehearing settlement conference was held, but the case was not resolved. (*Id.*) Not hearing from the Division about a trial date, Lutbak called the Division and left her name, but no one from the Division called back. She then

wrote Governor Pataki. (Tr. at 228, 230; PE 23). On July 30, 1998, her case was called for a prehearing conference. (Tr. at 232). She received the disturbing news that two of her harassers had died, jeopardizing her prospects of prevailing (Tr. at 234-35), and respondent's attorney asked the ALJ whether, in view of the long delay by the Division in bringing the matter to a hearing, respondent was going to be held liable for back wages for the entire period since the case was initially filed, or for only a small portion of that time. (Tr. at 234). A hearing was scheduled for January, 1999. (Tr. at 235).

Lutbak testified that the delay has required her to leave a career she loved and to enter one she did not. She has had to accept a cut in pay and to continually work overtime to make up the difference. (*Id.*) She stated that she is still emotionally affected by the case. "I have lost a lot of my life and there is still no closure. . . ." (Tr. at 236).

Michele Statile filed her complaint in December, 1992. (Tr. at 304). She testified that she kept in contact with the Division so she could receive information on how her case was proceeding. In August, 1993, she filed a change of address with the agency. She called the Division in 1994, and was told her case was still pending. When she called in 1995, however, she learned that the Division had dismissed her case because it could not locate her. (Tr. at 304). It had sent a notice to her old address which she no longer occupied. The Division suggested that she write to request that her case be reopened and that the Division would notify her of its decision. She acted on the Division's suggestion. (Tr. at 307; PE 30). She heard nothing in response. (Tr. at 308). After her testimony at trial, the Division reopened her case. (Tr. at

772). Unfortunately, Statile, not having heard from the agency about her request to reopen her case, felt there was no point in keeping her documents and threw all of them away. (Tr. at 308). She has now lost track of five of her six witnesses (Tr. at 309), and is unsure of some of the facts involved in the controversy. (*Id.*)

Statile testified that she experienced financial difficulty for the first two years after her allegedly discriminatory termination. She learned that her former employer had been sending out unfavorable reports about her to prospective employers. (Tr. at 309-10). When she learned what was happening, she got in touch with her immediate supervisor at her former place of employment and he wrote good references on her behalf, so that is no longer an issue. She believes, however, that had her case been processed more promptly her dire financial hardship — which forced her to move in with her parents — could have been avoided. (Tr. at 310). She also faults the Division's laggard handling of her case with her periodic attacks of depression, headaches, and marital discord. (Tr. at 311-12).

Anita Brooks-Lewis filed a complaint alleging race discrimination on July 20, 1990. (Tr. at 237). A probable cause determination was made in April, 1993. The case has progressed no further since then. She has contacted the Division many times by letter and by phone seeking further movement in her case. No conferences or hearings have been scheduled, apparently because of the Division's heavy backlog and limited staff. In August, 1996, she received a letter advising her of a large backlog of cases awaiting public hearing. (PE 26). Another letter arrived in June, 1997,

advising that a wait of several months in scheduling the actual date of her prehearing conference "is well within the framework of our normal case calendaring procedures." (Tr. at 240; PE 27). In 1998, the Division wrote again stating that the hearing unit had some two thousand cases pending and "only a few [ALJ's] to hear these cases. This may result in a lengthy interval before your case is given a calendar date." (Tr. at 241-41; PE 28). The company she worked for is no longer operating. She does not know where the person whom she charged with discriminating against her is located, the people she used to work with are difficult to reach, and she has difficulty remembering the facts. "It is a mental burden to carry . . . [the details of my complaint] for eight years and to [be required to regurgitate it] all over again." (Tr. at 244).

James Close filed a claim of sex discrimination on January 17, 1992. (Tr. at 337). Two years later a probable cause determination was made, and two years after that determination a prehearing conference was held. (Tr. at 339). A public hearing was held in March and April, 1998. (Tr. at 343). At the time of this trial in August, no final determination had been made in Close's case. Close had the help of his own lawyer and an Assemblyman who pressured the Division and Governor Pataki with letters expressing frustration with the length of time the Division was taking in processing his case. (Tr. at 339-43). He testified that the delay deprived him of the use of the testimony of two potential witnesses because of memory loss and it limited his use of two other persons for similar reasons. (Tr. at 344-45). He testified that his career had been set back by the delay. His complaint challenged his being denied a promotion, at a job where he still works, and

he is in effect in limbo at the job site until his complaint is finally decided. (Tr. at 345-46).

Bernadette Thomas filed a claim of race and sex discrimination on February 23, 1987. In May, 1993, she withdrew the sex discrimination claim in connection with a class action suit *sub nom Melanie v. Board of Education* in federal court. In January, 1995, there was a probable cause determination on the race discrimination claim. In June, 1995, the sex discrimination claim was reinstated in the Division proceedings and a probable cause determination was made. (Tr. at 656-58). Since these determinations there has been no further progress in the Division proceedings. Two Congressmen have written to the Division on her behalf (Tr. at 659; JE 11A), but there has still been no progress. In 1996, Thomas decided to pursue her claims in federal court. (Tr. at 660). Three of her witnesses have now died and others have retired or relocated. She continues to work, but without promotion or salary increase, the denial of which had caused her to seek relief from the Division in the first place. (Tr. at 662). She is suffering from anxiety, stress, insomnia, and headaches which she attributes to the way the Division has handled her claims. (Tr. at 661-62).

Jane Doe is the administratrix for John Doe, who filed a race discrimination claim on August 29, 1990 (Tr. at 98-99), and who died on September 13, 1991. (Tr. at 93). No effort was made to contact him until February, 1994, over two years after his death. Division only made contact with Doe's widow (Tr. at 95, 103; JE 2). A no probable cause determination was rendered in 1995. (Tr. at 102). John Doe was the only person, as far as his widow knew, who had personal

knowledge of the facts in the case and whose testimony could have avoided a no probable cause determination.

Clarice Seegers filed a claim on May 11, 1990, charging that she had been subjected to discrimination based on her race, sex, and disability. (PE 53, p. 15). A probable cause determination was made and a public hearing was conducted in April, 1997, and concluded on August 7, 1997. On December 12, 1997, she received notice of a recommended ALJ decision awarding her $17,503.00 in back pay and $7,500.00 in compensatory damages. An award of prejudgement interest was not recommended. (*Id.* pp. 13-14). She settled with respondent on September 9, 1998.

Altheria Anderson filed a claim of race discrimination in housing on December 21, 1990. (Tr. at 324). On December 1, 1997, a Commissioner's order was issued awarding her $10,000.00 for pain and suffering and $10,000.00 in punitive damages. She has been unsuccessful thus far in her effort to collect on the judgment. (Tr. at 328). She testified that the seven year delay caused her to suffer emotional trauma emanating from her feelings of not being heard and of being pushed aside. (Tr. at 328-29).

In September, 1992, Michael Campbell filed a complaint of race discrimination in housing. (PE 37, pp. 8-9). A probable cause determination was made in June, 1993. (*Id.* p. 11). No other Division activity occurred in the case, and he settled in July, 1997. At that time, Campbell believed he had a terminal illness (*i.e.*, inoperable blood clots on the brain). (*Id.* pp. 23-25). He testified that the way his case had been handled by the Division had resulted in his loss of faith in the government. (*Id.* p. 26).

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Carol Mandros filed a disability discrimination claim on February 12, 1989. (PE 38). She died on February 22, 1994, with no resolution of her claim by the Division. (PE 39).

Plaintiffs offered the testimony of Sheila Akabas, Director of the Center for Social Policy in the Workplace at Columbia University. Akabas is an expert on memory and on the psychological and emotional effects experienced by those discriminated against, or those who perceive themselves to be so victimized by a governmental agency's long delays in processing their discrimination claims — *i.e.*, by those very agencies charged with vindicating their right to be free of discriminatory conduct. She testified that the literature indicated that those discriminated against feel helpless and frustrated, and that governmental delays in processing their discrimination claims can only add to these feelings, particularly since it is unusual for people in the workplace to make formal complaints of discrimination because of fear of retaliation and loss of their jobs. Persons who file formal complaints feel vulnerable in bringing attention to themselves out of concern that they will not be believed. She testified that among people of color in this country there is a learned helplessness, a perceived futility in complaining about discrimination that is intensified when, after deciding to proceed, an individual is told that a huge backlog of cases will result in extended administrative delays. She also testified that memory fades over time; and that a participant or principal to an event is likely to retain memory of the events longer and more clearly than a witness with no stake in the outcome. Her testimony was general. She had not interviewed any of the class representatives. (Tr. at 430-488).

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Shawn Utsey, professor in the Department of Psychology at Seton Hall, testified as an expert on the trauma experienced by African-Americans when their claims of discrimination are subjected to inordinate processing delays by those state agencies from which they are supposed to secure redress. In this country, discrimination has a constant impact on blacks, and delays by the government in processing their claims is felt as another impact of discrimination. Most blacks want to avoid confronting racism and seek to exhaust other possibilities before concluding that race discrimination has occurred. Delays in processing claims of discrimination discourage blacks and reinforce cynicism about those government agencies established to protect them. Some will be sufficiently discouraged to abandon their cases. Utsey also gave generalized testimony, based on his and other psychological and sociological studies, which established that, based on the history of race relations in this country, blacks who file discrimination claims with a governmental body to secure redress, and who are seemingly ignored, become emotionally disturbed and lose faith in the system. (Tr. at 172-208). This seems more or less common sense.

None of these experts had examined any of the individual claimants, so their testimony amounted to general truisms of what the norm would be among claimants similarly situated. Defendants' expert took issue with some of the opinions voiced by the memory expert, but since the only use of her opinion to the court was that memory fades over time, and that one not central to the events but a bystander is likely to forget what happened more quickly than the figure central to the events, an opinion with which defendants' expert did not seriously contest, the court also classified her

testimony as common sense. In sum the experts, other than Robert Faust the statistician, had little influence on the court's thinking.

The testimony of the individual claimants and class representative as to the effect of the delays on their ability to recall the events, on how the delay had seriously dimmed the recollection of proposed witnesses of critical events, on how over time contact had been lost with witnesses and respondents who had moved away or died, and had adversely and fatally compromised certain of the claimants' ability to successfully support their claims, was not challenged. The fact that all of this adversely impacted claimants emotionally cannot be seriously disputed.

The policy of ACD dismissals for failure to locate and failure to cooperate was changed in 1995. The current, more "complainant-friendly" approach should result in fewer ACD terminations. Prior to the change a case was ACD'd for failure to locate if the Division sent two letters to the complainant's listed address (one regular and one by certified mail) plus placed two telephone calls. If there was no response to these efforts the case was ACD'd. The new policy requires the Division to process the case to a conclusion on the merits if that can be done without the complainant being available. Thus, under the current policy, the complaint can be processed to a probable cause determination while efforts go forward to locate the complainant.

(Tr. at 713-14).

No complaint will now be ACD'd for failure to cooperate unless a complainant in possession of information without

which the case cannot be processed refuses to come forward with that critical information. (Tr. at 704). This new policy is also likely to increase the number of cases being processed, or awaiting to be processed, at the regional level.

The Division also ACD'd cases on notice that the respondent was in bankruptcy (Tr. at 523-24), but the Chief ALJ testified that cases are not supposed to be ACD'd on this basis. (Tr. at 839; Regional Office Manual (DE CC at XX1-6 & XXV-14 § d)). If this practice is ended, there will be additional cases pending.

III. ANALYSIS

The court begins its analysis with Division's challenges to the plaintiff subclasses, as these challenges are equivalent to standing challenges. *See Lewis v. Casey*, 518 U.S. 343, 349-50 (1996) (explaining that the court must find that the named plaintiffs for a class litigated the facts necessary to establish classwide injury before awarding plaintiffs relief). Therefore, the court begins with the question of whether the named plaintiffs have shown that the plaintiff subclasses suffered "actual harm." *Id.* at 349.

A. CHALLENGES TO CLASS CERTIFICATION

1. Challenges to the NOW I Certification Orders

Defendants first argue that they were unable to defend against the plaintiff subclasses' claims because the classes are overbroad and they do not have properly identified named plaintiffs. (Def. Post Trial Mem. of Law at 177). Defendants'

goal is to have the court decertify the plaintiff subclasses and require plaintiffs to prove that defendants are liable to them on an individual basis. *Sirota v. Solitron Devices*, 673 F.2d 566, 572 (2d Cir. 1982) (recognizing option but declining to decertify).

Defendants base their claim on *Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997), a case in which the Second Circuit established that, prior to trial, the court has a duty to separate overbroad and ambiguously defined classes into appropriately defined subclasses. *Id.* at 375. *Marisol*, however, merely reminds courts to subject each subclass to a rigorous analysis under Rule 23 prior to trial. *Cf. Burka v. New York City Transit Authority*, 110 F.R.D. 595, 600 (S.D.N.Y. 1986) (Goettel, J.) (explaining that each subclass must comport with Rule 23). Therefore, defendants' challenges must be considered in light of Rule 23(a) prerequisites, namely the requirements of numerosity, commonality, typicality, and adequacy. *See Monaco v. Stone*, 187 F.R.D. 50, 60-63 (E.D.N.Y. 1999).

a. Challenges to Subclass A

Defendants argue that they did not have adequate notice of the claims raised for subclass A. In *NOW I*, the court recognized subclass A as "all persons who have been, are or may be subject to dismissal of their complaints because defendant Margarita Rosa, [Division] Commissioner, has taken longer than three years from the date the complaint was filed to finally resolve the complaint." *NOW I*, 182 F.R.D. at 33. The claims raised for the class were that Division's delays had led to the loss of evidence, and the loss of

witnesses, and therefore created the risk that members of subclass A would have their claims erroneously dismissed in violation of their due process rights. *Id.* at 32 (discussing these claims as part of the original class encompassing subclasses A and B). Doe, Britt, Seegers, and Thomas, were identified as subclass A's named plaintiffs, and their complaints raised the issues necessary to establish class wide liability for subclass A. *See, e.g.*, (Segeers Cmplt. 3, 7, 8) (arguing that Division's delay caused her to forget the facts about her discrimination incident and lose her witnesses); (Doe Revised Proposed Intervenor Cmplt. at 1-2) (claiming that the complaining witness died before Division contacted him).[2]

Defendants next contend that the named plaintiffs for Subclass A did not litigate the issues necessary for a finding of class wide liability. However, named plaintiffs presented evidence about how Division's delay led to the loss of witnesses (Tr. at 661) (Thomas); (Tr. at 96) (Doe); (Tr. at 363-64, 371) (Britt), and evidence on how Divisions delay caused them emotional injury (Tr. at 374) (Britt); (Tr. at 98) (Doe); (Tr. at 661-62) (Thomas).

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2. Post trial subclass A members raise two additional claims: (1) they claim that they were injured when Division dismissed their claims because of respondents' bankruptcy, and (2) that Division's delays caused emotional injury leading them to abandon their claims. (Def. Post Trial Mem. of Law at 10-12). No named plaintiff litigated whether Division erroneously dismissed complaints based on the named respondent's bankruptcy; therefore this claim is not reviewed. The claim regarding plaintiffs' emotional injuries is related to subclass A's other claims that Division's delay caused them harm, and because this issue was raised prior to trial, *see NOW I*, 182 F.R.D. at 37, the claim is included in the court's analysis.

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b. Challenges to Subclass B

Defendants also contend that subclass B was imprecisely defined and therefore they could not defend against the claims raised by the class. In *NOW I* the court recognized subclass B as "all persons who have been, are, or may be subject to a reduction in monetary relief awarded, either by order of Commissioner Rosa or by court order, because it has taken longer than three years from the date the complaint was filed to render a final administrative determination." *NOW I*, 182 F.R.D. at 33. Prior to trial, plaintiffs indicated that subclass B's members were raising equal protection and due process claims against Division, alleging that Division's delay in processing their claims led to their discrimination awards being reduced. *Id.* at 32.

Defendants also contend that no named plaintiff represented subclass B. However, Clarice Seegers, the named plaintiff for subclass B, presented circumstantial proof that the ALJ in her case did not award her prejudgment interest on her award because of Division's delay, (PE "53" 13-15), and she presented the court with New York state precedent showing that persons' prejudgment interest and damage awards were discounted by the amount of time attributable to Division's delay. *See, e.g., State Univ. Agric. and Tech. College at Farmingdale v. State Div. of Human Rights*, 520 N.Y.S.2d 814 (1987) (reducing backpay award); *State Div. of Human Rights v. Massive Econ. Neighborhood Dev. Inc.*, 366 N.Y.S.2d 23 (1975) (reducing prejudgement interest award).

Defendants next argue that Seegers's damage award was not reduced because of Division's delay, and therefore she

did not prove the injury raised for subclass B. However, a named plaintiff can litigate the interests of a class when the trial evidence shows he has not been injured by defendant, as long as plaintiff's claim raises the issues necessary to determine whether the injury allegedly inflicted on the class occurred. *See Sirota*, 673 F.2d at 572. The evidence described above was sufficient to raise the issues relevant to subclass B's claim.

c. Challenges to Subclass C

Defendants also contend that subclass C was ambiguously defined, and therefore they were unable to defend against the class's claims. In *NOW I* subclass C was defined as being composed of persons who "may be subject to administrative convenience dismissals because [Division] was unable to locate complainants or [Division] determined that the complainants had failed to cooperate and such complaints had been pending at [Division] for more than one year." *NOW I*, 182 F.R.D. at 35. The *NOW I* decision also identified subclass C's named plaintiffs: NOW and, if NOW failed to be an adequate representative, Britt and Seegers would serve in this capacity. *NOW I*, 182 F.R.D. at 36. Defendants were also informed that subclass C's members alleged that Division's use of an ambiguous ACD notification letter, and its failure to follow reasonable procedures for contacting complainants at risk for ACD violated plaintiffs' due process rights. (*See* Plf. Intervenors' Mem. of Law at 5-9).

Defendants next allege that the named plaintiffs for subclass C, NOW, Britt and Seegers, failed to prove at trial

that they suffered the injuries from the ACD process raised by subclass C. Defendants' challenge to NOW's representation of subclass C requires the court to determine whether NOW can show that (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the litigation. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Only the claim raised is at issue here, as NOW's challenges to Division's ACD process could be brought by its own members, and it raises a claim germane to its purpose in remedying discrimination. Lastly, NOW only seeks injunctive relief which does not require proof of individualized damages. *Id.*

Associations with representational standing generally are barred from raising claims requiring individualized proof. *See Miller v. Silberman*, 951 F. Supp. 485, 491 (S.D.N.Y. 1997) (Kram, J.). They may, however, raise claims that require the court to compare the defendant's policy or laws with another legal standard. *See NOW v. Terry*, 886 F.2d 1339, 1348 (2d Cir. 1989).

NOW brought three challenges to Division's ACD procedures. First, NOW alleged that Division's complainant contact policies for persons at risk for ACD, on their face, violated complainants' due process rights because they provided insufficient notice of the impending termination of complainants' claims. Second, NOW challenged Division's use of an ambiguous ACD warning letter [Hereinafter Post 1991 ACD letter] to inform parties that they were at risk for

ACD. Third, NOW challenged the Division's ACD process as applied, arguing that Division failed to follow its own procedures for contacting complainants and therefore arbitrarily extinguished plaintiffs rights.

NOW may raise two challenges to the ACD process: whether the "Post 1991 ACD letter" and the Division's complainant contact procedures comport with the requirements of the due process clause. NOW may raise these claims because they only require the court to compare Division's policies with due process standards. Plaintiffs third claim, the "as applied" challenge to Division's ACD complainant contact procedures is barred, as the claim requires a showing that individual plaintiffs who complied with Division procedures still had their claims dismissed under the ACD policy. Because NOW cannot properly raise the "as applied challenge" the court considers whether Britt and Seegers can litigate this issue.

The trial evidence, however, shows that Seegers did not litigate the issues necessary to determine whether the ACD process inflicted due process injury on subclass C's members. *See Lewis v. Casey*, 518 U.S. 343, 356 (1996). Seegers never received an ACD letter; she was not subject to a Division official's omission that resulted in her claim being terminated; and she did not suffer injury because she failed to respond to an ambiguous Division communication. These were the issues and circumstances subclass C alleged would prove their injuries. *(See Plf. Intervenors' Mem. of Law* at 5-9). Britt, while he received an ACD letter, did not receive the "Post 1991 ACD Letter" subclass C alleges inflicted its injuries; additionally, Britt responded to the letter without

suffering detriment to his claim. (Tr. at 368). In light of the evidence presented at trial, the court must conclude that none of the named plaintiffs for subclass C provided the court with sufficient basis to make a finding on the class's as applied challenge to Division's ACD complainant contact procedures.

2. Class Certification Challenges Under NOW II

Defendants also argue that *NOW II* mooted subclass A's and subclass B's claims because the decision granted defendants qualified immunity from the claims of persons with pending complaints at Division, and persons in subclasses A and B, by definition, have pending claims. Defendants' claim fails on two grounds. First, there are members of subclasses A and B who have damage claims against defendants: these plaintiffs' claims have been finally dismissed or resolved, yet plaintiffs can show that evidence in their cases was lost or their damage awards reduced because of Division's delay. Second, although *NOW II* bars plaintiffs with pending claims from seeking damages from defendants, these plaintiffs may still seek declaratory or injunctive relief. *See Ramirez v. Coughlin*, 919 F. Supp. 617, 622 (N.D.N.Y. 1996).

Defendants next argue that the *NOW II* decision required plaintiffs' counsel to recertify the plaintiff subclasses in order to distinguish between plaintiffs solely entitled to injunctive relief and those eligible to receive money damages. The court cannot identify any way in which plaintiffs' counsel's failure to recertify the classes compromised the defense. The distinction between pending and non-pending claims would only have had significance after the trial determining whether

defendants were liable to plaintiffs. The court, therefore, rejects defendants' claim that its decision to allow the plaintiff classes to litigate the question of liability without splitting the classes harmed defendants' case.[3]

The court summarizes its decisions regarding defendants' class certification challenges here. Subclass A, represented by Doe, Britt, Seegers, and Thomas, is comprised of persons who allege that because of Division's delay they lost evidence and witnesses and suffered emotional injury, all of which subjected them to the risk of erroneous dismissal of their claims and therefore violated their due process and equal protection rights. Subclass B's members, represented by Seegers, allege that Division's delay caused the damage awards in their cases to be discounted for the amount of time attributable to Division's delay and therefore violated their equal protection and due process rights. Subclass C is represented by NOW; NOW alleges that Division's complaint contact procedures, on their face, violated subclass C members' due process rights.

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3. Defendants improperly read *NOW II* as stating that all the claims in this action must be brought under *Polk* to be valid. *See Defendants Post Trial Mem. of Law* at 180. However, when the court recognized that some claims in this case might be "factually distinguishable from th[e claim] . . . asserted in *Polk*," it merely indicated that the plaintiffs whose claims were not controlled by *Polk* could sue for damages. *NOW II*, 14 F. Supp. 2d at 429.

Appendix B

B. DUE PROCESS CLAIMS

1. Complainants' Property Interest

All of the plaintiffs' claims are based on *Logan v. Zimmerman*, 455 U.S. 422 (1982), a case which they allege establishes that persons have a federally protected property interest in the state law discrimination claims they submit to state administrative bodies for adjudication. In *Logan*, appellant sued a state administrative commission that adjudicated state law discrimination complaints when the commission terminated his complaint. The commission terminated the complaint because its staff had failed to timely hold a statutorily-mandated employer-employee conference on the appellant's employment discrimination complaint. Appellant alleged that the commission had deprived him of his complaint without due process of law. The Supreme Court held that plaintiffs' property interest in the complaint entitled him to have the Commission consider the merits of his charge, "based on the substantiality of the available evidence, before deciding whether to terminate his claim," *id.* at 434-35, and that the complaint could not be terminated except "for cause" based upon the evidence in the complaint, *id.* at 431-32, or alternatively, it might be "surrendered for value." *Id.* The *Logan* decision makes it clear that the "State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Id.* at 434.[4]

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4. The *Logan* Court, however, did recognize that a complaint legitimately may be dismissed by the state because of procedural defects, such as an expired statute of limitations. *See Logan*, 455 U.S. at 437.

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Defendants contend that plaintiffs do not have an independent property interest in the state law discrimination claims they submit to Division because under *Polk* plaintiffs only have one property interest in the "full remedial scheme" of civil rights laws. *Polk*, 711 F.2d at 508.[5] Defendants argue that, as long as a plaintiff's federal or state claim on a discrimination incident remains pending, the plaintiff cannot show that he has been deprived of his property interest in the claim. Defendants' argument, however, does not give sufficient weight to the distinct and independent value that federal and state law claims have, or the independent value court adjudicated and administratively resolved claims have. Indeed, several recent cases recognize the need to keep one's federal and state discrimination claims from having preclusive effect on one another. *See e.g.*, *Astoria v. Federal Savings & Loan v. Solimino*, 501 U.S. 104 (1991). Additionally, the New York courts have recognized that "[t]he administrative forum offers a complainant remedies not available from a court." *Marine Midland Bank v. New York State Div. of Human Rights*, 75 N.Y.2d 240, 244 (1989). *See also Murphy v. Am. Home Prods.*, 58 N.Y.2d 293, 307 (1983). Both sources of precedent counsel against treating plaintiffs as having one property interest in the full remedial scheme of civil rights laws.

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5. Defendants argue that *Polk* bars plaintiffs' claim that they have a property interest in Division's intake rules or the case processing time limits established under the HRL. *See Polk*, 711 F.2d at 509. However, plaintiffs are not making the claim raised in *Polk*; rather they assert that they have a right to reasonable access to Division, and a right to have Division process their claims in a manner that does not arbitrarily deprive them of their interests.

However, even if plaintiffs have a single property interest in the full remedial scheme of civil rights laws, plaintiffs' here contend that their complaints at Division are the only property interest available to them under the scheme because they are, for various reasons, unable to present their claims in state court or federal venues. *Cf. Polk*, 711 F.2d at 508. Plaintiffs point out that in many cases there are state law barriers preventing them from filing state court claims on incidents they have filed complaints about with Division. Under 18 N.Y. Exec. L. § 297.9, a person must choose between asserting his state law claims in court or through Division. Once a Division complaint is filed, the complainant cannot bring a state law claim in court on the incident until Division grants him an ACD dismissal. *See Murphy*, 58 N.Y.2d at 307. The August 5, 1997 amendments to the HRL now allow complainants to request that Division ACD their claims to allow them to bring claims in state court. *See Moodie v. Fed. Reserve Bank of New York*, 58 F.3d 879 (2d Cir. 1995). However, this option does not help many plaintiffs, for the Amendments also provide that persons whom request an ACD will be bound by the three year statute of limitations for their claims marked as of the date they initially filed their complaints with Division. *See* 18 N.Y. Exec. L. § 297.9.; (DEA, 1996-1997 Report at 29). Therefore, members of the plaintiff subclasses "whose complaints have not been finally administratively adjudicated or otherwise resolved within three years of the date of the filing of the complaint" will be unable to seek redress under the 1997 Amendments.[6] *NOW I*, 182 F.R.D. at 33.

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6. The statute of limitations for an HRL claim is generally tolled under CPLR § 204 during the period the complaint is before the (Cont'd)

The court also recognizes that many of the plaintiffs cannot bring federal claims because federal law does not provide a cause of action for all injuries recognized under the HRL. *See, e.g.*, 18 N.Y. Exec. L. § 296.1 (describing exclusive state law remedy for discrimination based on "genetic predisposition"); *see also, Reeves v. Johnson Controls World Servs.*, 140 F.3d 144, 154-55 (2d Cir. 1998) (noting that the HRL protects a larger universe of disability-based discrimination). The state and federal anti-discrimination laws also vary on matters such as jurisdiction and statute of limitations. *Compare* 18 N.Y. Exec. L. § 292.5 (defining "employer" covered by the HRL as employers with 4 or more employees), *with* 42 U.S.C. § 2000e(b) (defining "employer" covered by Title VII as employers with 15 or more employees).

In short, the court finds that plaintiffs have shown that they are barred from pursuing claims outside of Division either because of the distinctions between the federal and state civil rights laws or because of state law procedural barriers, and therefore they have a property interest in their Division complaints because these complaints are their only means to address their discrimination claims.

2. Deprivation of the Property Interest

Defendants ask the court to dismiss all plaintiffs' claims who have complaints pending at Division because *Polk*

(Cont'd)
Division. *See Pan Am. World Airways, Inc. v. New York State Human Rights Appeal Bd.*, 61 N.Y.2d 542, 549 (1984). However, persons who request an ACD under the 1997 Amendments are denied this tolling option.

establishes that persons with complaints pending before Division (or any other tribunal) cannot show that Division has deprived them of their complaints, as these pending claims are proof that plaintiffs' property interest in their complaints have not yet been destroyed. Indeed, in *Polk* the Second Circuit rejected the appellant's claim that Division had deprived him of his property interest in his discrimination claim because the appellant had a pending Title VII action based on the same discrimination incident. *See Polk*, 711 F.2d at 509. The Court of Appeals concluded that it could not determine whether Division had deprived appellant of his property interest in his claim until the Title VII claim was resolved because the Title VII decision might make him whole. *Id.*

This court, however, does not view *Polk* as a barrier to the plaintiff classes' claims. The *Polk* Court rejected Polk's claim of prejudice because it was "an assertion only," *id.* at 509, suggesting that he had provided no evidence to support his contentions. The *Polk* Court left open the possibility that if Polk's Title VII claim were dismissed because of Division's delay, this dismissal might be factored into its decision as to whether he had suffered prejudice. *Id.* at 509, n.3. The court concludes that the *Polk* case is different from the instant action because plaintiffs here have provided specific evidence of how their claims have already been compromised by Division's delays, and because they have demonstrated that many plaintiffs do not have alternate adjudication methods open to them.

Defendants next argue that *Polk* establishes that Division's administrative delays cannot deprive persons of

their property interest in their claims, and therefore plaintiffs' claims must be rejected. The *Polk* Court actually concluded that a plaintiff's mere "assertion" that Division's delay caused him injury would not support a due process claim. *See Polk*, 711 F.2d at 509. In other cases the Second Circuit has held that unreasonable administrative delay may result in the deprivation of property. For example, in *Kraebel v. New York City Department of Housing Preservation and Development*, 959 F.2d 395, 404 (2d Cir. 1992), the Second Circuit found that a city housing program's delay in processing reimbursement applications could deprive landlords of their property interests in the right to payment. *See also Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir. 1989) (recognizing that delay can deprive persons of their property interests).[7]

Furthermore, an administrative delay causing actual prejudice to a plaintiff's claim is sufficient to show deprivation under the due process clause. *See, e.g., DeMichele v. Greenburgh Cent. Sch. Dist. No. 7*, 167 F.3d 784, 790-91 (2d Cir. 1999) (finding that "a showing of actual prejudice" is an essential element of a due process claim of unconstitutional delay). Actual prejudice is shown when plaintiff demonstrates that delay led to the loss of documentary evidence or a key witness. *See United States v. Lovasco*, 431 U.S. 783, 796 (1977) (describing loss of material witnesses as actual prejudice); *United States v.*

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7. The mere fact that a claim is pending at Division cannot, by itself, preclude a due process claim; otherwise, no amount of administrative delay would ever implicate complainants' property rights. *See Kraebel*, 959 F.2d at 405 ("implicit in the conferral of an entitlement is a further entitlement to receive the entitlement within a reasonable time").

Cornielle, 171 F.3d 748, 752 (2d Cir. 1999) (same). Therefore, the court concludes that plaintiffs may prevail on their claim that Division's delays deprived them of their property interest in their discrimination claims, if they show that Division's delay actually prejudiced their claims.

a. Subclass A's Evidence of Actual Prejudice.

Plaintiffs in subclass A claim that Division's processing delays eroded the evidentiary basis for their claims, and therefore actually prejudiced their claims. Named plaintiffs demonstrated that the class was in fact injured: Dellie Britt testified that he lost witnesses, (Tr. at 370) as did Bernadette Thomas (Tr. at 661). Other witnesses established that the injury was widespread within the class: including, Robert High, (Tr. at 124) (testifying that he lost twenty of his twenty-three witnesses); Piper Lutbak (Tr. at 234-35) (testifying that two of her harassers died in the eight year period her claim was pending); Anita Brooks-Lewis (Tr. at 242) (testifying that the respondent company named in her complaint closed and her respondent harasser cannot be located). These facts are sufficient to show that persons in subclass A who lost witnesses suffered actual prejudice as a result of Division's delays.[8]

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8. In *NOW II*, the qualified immunity decision on this case, the court held that defendants reasonably could have interpreted *Polk* to provide that they were not depriving plaintiffs of their property rights in their Division complaints as long as the complaints were pending before Division or another tribunal. *NOW II*, 14 F. Supp. 2d at 427. The court's decision did not establish that this was the correct interpretation of *Polk*, as the court identified precedent that supported the conclusion that due process protections attach prior to the final destruction of a claim. *NOW II*, 14 F. Supp. 2d at 429.

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Subclass A also presented proof that Division's delays sometimes resulted in a complaining witness dying before Division began adjudicating his claim. The court received evidence showing that named plaintiff John Doe passed away while his complaint was pending, and evidence showing that Division ultimately rendered a no probable cause determination on his case. (Tr. at 93). Doe's widow testified that Doe was the only person who had personal knowledge of the facts of his case. (Tr. at 102-103). The court also received evidence showing that other class members suffered the same injury. (PE 38) (describing similar scenario involving complainant Carol Mandros). These facts were sufficient to prove that the group of plaintiffs in subclass A who died before their claims were processed suffered actual prejudice as a result of Division's delays.

Plaintiffs in subclass A also claim that Division's delays led complainants to lose their memories of the events that are the basis for their discrimination claims. The Second Circuit, however, has established that proof of memory loss, standing alone, is insufficient to establish that a claim was actually prejudiced by delay. *See De Michele*, 167 F.3d at 791; *United States v. Elsbery*, 602 F.2d 1054, 1059 (2d Cir. 1979) (same). Therefore, this claim of prejudice fails.

Plaintiffs in subclass A also claim that Division's processing delays caused them emotional injury which prejudiced their claims because their injuries compromised their ability to prosecute their complaints. The court could find no authority that recognizes emotional injury as a form of actual prejudice, and the nexus between the injury and the processing delay seems too tenuous to support a finding of actual prejudice. Therefore, the court rejects this claim.

b. Subclass B's Evidence of Actual Prejudice

Plaintiffs in subclass B contend that Division violated their due process rights when Division officials discounted their prejudgment interest and backpay awards to account for the amount of time attributable to Division's processing delays. Plaintiffs' claim is based on the assumption that persons have a property interest in prejudgment interest and backpay awards. However, New York law establishes that these awards are not automatic entitlements under the HRL, but rather are conferred at Division's discretion. *See* 18 N.Y. Exec. L. § 297(4)(c)(ii) (explaining that Division can construct an award "with or without backpay"); *see also*, CPLR § 5001(a) (explaining that the court has discretion to award prejudgment interest). Therefore, the court concludes that Division officials' actions, reducing these awards, did not violate plaintiffs' due process rights as plaintiffs have no property interest in these kinds of damage awards.

c. Subclass C: Deprivation From ACD Determination Process

NOW, on behalf of subclass C, contends that Division's complainant contact procedures for persons at risk for "failure to locate" and "failure to cooperate" ACD's violated subclass C's members due process rights because Division failed to take adequate steps to locate persons at risk for ACD before dismissing their claims. The court considers whether the state's procedures were "reasonably calculated, under all the circumstances, to apprise [the] interested part[y] of the pendency of the [state's] action and afford [him] an opportunity to present [his] objections." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988).

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At trial, plaintiff NOW presented evidence showing that Division had an established policy of subjecting claims to ACD for "failure to locate" and "failure to cooperate." (PE "1"). NOW also showed that under the ACD policy Division officials were required to make two phone calls and mail two letters to the complaining party before dismissing his complaint. (Tr. at 496 & DE "CC" at XXV-13). NOW also provided evidence showing that Division officials relied on mail forwarding to contact complainants whose files had been pending for more than one year, knowing that the post office does not forward mail for more than one year after a party's move. (Tr. at 496). Plaintiff also showed that Division had other information, such as complainants' social security numbers, that could easily have allowed the agency to locate missing complainants, yet the agency failed to use this information. (DE "CC" at XV-2) In light of this evidence, the court concludes that Division did not take all reasonable steps to apprise complainants that their claims were at risk for ACD, and therefore deprived complainants of their claims without adequate predeprivation notice.

Additionally, NOW alleges that Division's ambiguous "Post 1991 ACD Letter" failed to provide complainants with proper predeprivation notice about the impending ACD determinations they faced. NOW's claim is based on *Christopher v. Secretary of Health & Human Services*, 702 F. Supp. 41, 43 (N.D.N.Y. 1989), which establishes that "even a notice which is merely ambiguous may violate an applicant's due process rights." Indeed, in that case, the court recognized that a letter's "very ambiguity may cause it to be misleading . . . . [and] may prevent the notice from being of such a nature as reasonable to convey the required information." *Id.* (citations omitted).

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Plaintiffs presented both circumstantial and direct evidence showing that the "Post 1991 ACD Letter" was insufficient to inform complainants that they were required to contact Division in order to continue their cases, and it did not inform complainants of their right to contest an ACD determination. The court received testimony from Deputy Commissioner Lind that the "Post 1991 ACD Letter" did not adequately inform parties that their claims were at risk for ACD. (Tr. at 505). Additionally, the court received evidence showing that prior to 1991, before the Division was under pressure to reduce its backlog of cases, the Division informed complainants of impending ACD determinations in a much clearer letter. (PX 7). Given this evidence, the court finds that the Division's "Post 1991 ACD Letter" was not designed to actually inform parties at risk of ACD of the steps necessary to avoid an ACD determination, or inform them about the steps necessary to reopen their complaints, and therefore these letters deprived plaintiffs of their property interest in their claims without proper predeprivation notice.

In summary, the only plaintiffs who have shown that they were deprived of a property interest are 1) subclass A's members who showed that Division's delays prejudiced their claims because the delays led to the loss of witnesses and 2) subclass C's members whose claims were terminated as a result of Division's Post 1991 ACD Letter and Division's ACD complainant contact procedures.

3. *Mathews v. Eldrige* Analysis

The court next turns to the question of whether plaintiffs in subclasses A and C were afforded the constitutional process

they were due. *Mathews v. Eldrige* requires that the court consider: 1) the private interest that will be affected by the official action; 2) the risk of erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and 3) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See Mathews*, 424 U.S. at 335.

a. Subclass A's Claims

i. Private Interest Affected

"The private interest affected by Division's [case processing] practices is that involved in deterring and being free of discrimination . . . ." *NOW II*, 14 F. Supp. 2d at 433. This interest includes the right to have one's discrimination complaint considered based on the substantiality of the evidence and without being subject to erroneous dismissal or prejudice. *See Logan*, 455 U.S. at 430. Rather than being merely a private interest, the interest in remedying discrimination is "shared by the plaintiff-intervenors and society generally." *NOW II*, 14 F. Supp. 2d at 433. This interest flows from a "bedrock constitutional principle," and is reflected in federal and state constitutional and statutory causes of action. *Id.* The court recognizes that subclass A raises a powerful private interest in its claims. If society does not take this interest seriously we all will suffer, as "[i]njustice anywhere is a threat to justice everywhere." Martin Luther King, Jr., Letter From A Birmingham Jail (Apr. 16, 1963), in Why We Can't Wait 76, 77 (1964).

Therefore, the court gives great weight to the private interest at issue in subclass A's claims.

ii. Risk of Erroneous Deprivation and Value of Substitute Procedure

Plaintiffs in subclass A have already shown that Division's processing delays have seriously compromised their discrimination claims, resulting in the loss of witnesses. The potential risk of erroneous deprivation has already come to fruition in this case. While the court recognizes that administrative delay is an unfortunate and ever present factor in dealing with an administrative agency, it also recognizes that Division's processing delays, which typically are in excess of three years, expose complainants to serious risk that the evidentiary basis for their claims will erode. Plaintiffs contend that a substitute procedure that permits Division to both rigorously and quickly assess claims will reduce the risk of an erroneous deprivation. Defendant Commissioner Mercado conceded as much when he recognized that "older cases are considerably more difficult to investigate and close." (PE 41) The court acknowledges that Mercado's efficiency improvement policies have in several cases trampled on complainants' rights; however, the policies also show that Division recognizes that a faster processing time would improve plaintiffs' ability to vindicate their interest in their discrimination complaints.

iii. State's Interest

Defendants claim that complaint processing is a highly complex and time consuming task, and that it would be an

enormous fiscal burden if Division were required to process complaints within the three year period suggested by plaintiffs. Defendants' arguments concerning the practicalities of administering the HRL warrant substantial deference. *See Kraebel*, 959 F.2d at 406. Division's investigatory tasks demand considerable attention, skill, work, and time. The court recognizes that Division's staff has endeavored to fulfill the State's commitment to equal opportunity in good faith. Therefore the court concludes that Division's concerns about properly carrying out its responsibility must be given some weight. *See id.*

Even after according Division's perspective due deference, the court concludes that the agency's request for an unlimited case processing period would allow Division to violate plaintiffs' due process rights. On average, it takes Division more than seven years to fully process and (when necessary) adjudicate a claim. This kind of delay is clearly unreasonable. If HRL case processing guidelines are used as a benchmark to assess the reasonableness of Division's actions, the scope of the problem becomes clear. *Compare* (Tr. at 410 & 490) (explaining that probable cause determinations take 21 months to 34 months) *with* (Tr. at 742-43) (noting that the statutory limit for the probable cause determination is 180 days). Division has offered no evidence showing that its expenditures would rise substantially if it took steps to improve its case processing time. The *Mathews* analysis, therefore, establishes that Division does not have sufficient interest in its current case processing procedures to defeat plaintiffs' claim of injury.

b. Subclass C: Mathews Analysis

The private interest injured by Division's ACD complainant contact procedures is the same interest at stake in Division's case processing regime: the interest in remedying and being free of discrimination. *See NOW v. Cuomo*, 14 F. Supp. 2d at 433. Additionally, Plaintiff NOW showed that the current Division complainant contact procedures for persons facing an impending ACD put complainants at risk for erroneous dismissal of their claims. Plaintiff first showed that Division only makes two phone calls and sends two letters to notify a complainant that he is at risk for an ACD. Plaintiff also showed that 94% of Division's ACD determinations are made after one year. (PX 1, Exhibit "3" at 12-13). Plaintiff further presented the court with postal regulations showing that mail forwarding ceases after one year, (Pls. App. "1") (discussing Domestic Mail Manual Issue 34, 3/18/90) a fact which indicated that Division's mailings to persons whose files are more than one year old are likely ineffective. The court also recognizes that if Division knows a complainant's on file address is stale, and then attempts to contact complainant at the phone number on file for this address, then logically this phone number will most often be stale as well. Plaintiff NOW also showed that the ACD procedure erroneously deprived a large number of persons of their claims. NOW presented statistics showing that 4000 complaints were subjected to ACDs between October 1990 through fiscal year 1995-96, (PX 1), many of which were dismissed for "failure to locate" and "failure to cooperate."

Plaintiff offered a number of alternate procedures that could improve Division's ability to contact persons at risk

for ACD. NOW argued that defendants could draft a clearer ACD letter, or return to Division's clearer pre-1991 ACD Letter. *Compare* (PE 7) (original clear letter) *to* (PE 8 & 15) (ambiguous ACD letters). Additionally, plaintiff argued that Division could use the Internal Revenue Service Mail Forwarding Service, or a people locator service, such as Auto Track (a service Division currently uses on other matters), to contact complainants. (Pls. Post Tr. Mem. of Law at 39 n.23) (listing alternate contact procedures).

Division offered no evidence to show that the established ACD procedure serves the state's interests; indeed, Deputy Commissioner Lind made general, albeit temporary, improvements in Division's ACD procedures in light of the substantial evidence that the ACD process was unfairly depriving persons of their claims. Lastly, the court was not provided with any concrete evidence that the improvements plaintiff recommended for the ACD procedure would greatly increase Division's costs. The court, therefore, concludes that the balance of evidence favors plaintiff's claims, and that Division's ACD complainant contact procedures and its Post 1991 ACD letter violated subclass C's due process rights.

C. EQUAL PROTECTION

Plaintiff subclasses A and B also claim that Division's case processing policies violated their right to equal protection because under these policies Division arbitrarily delayed processing certain complaints and subjected these complaints to the risk of erroneous dismissal and reduced damage awards.

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Division's case processing policy is analyzed under the rational basis test. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). To withstand the test, the state's policy must be "rationally related to a legitimate state interest." *Myers v. County of Orange*, 157 F.3d 66, 74 (2d Cir. 1998) (citations omitted). The policy "must be upheld against equal protection challenge if any reasonably conceivable state of facts could prove a rational basis for the classification." *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). A policy will fail the test if "the varying treatment of different groups or persons [under the policy] is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [state's] action was irrational." *Barry v. Baruchi*, 443 U.S. 55, 65 (1979).

Under the HRL, Division's mission is to ensure that "every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state." 18 N.Y. Exec. L. § 290.3 The HRL also provides that Division must "inquire into incidents . . . and conditions which may lead to tension and conflict among racial, religious and nationality groups, and to take such action . . . as may be designed to alleviate such conditions . . . ." 18 N.Y. Exec. L. § 295.11 The processing policy complained of here is Division's policy of queuing claims based on: the illness of the complainant (Tr. at 277-78); the seriousness of the respondent's actions; and the fact that a claim has a short statute of limitations. (*id.*) When these criteria do not apply, Division processes earlier claims before more recently filed ones. (Tr. at 278). These indicia suggest that the Division is prioritizing claims which represent either

a widespread or severe risk of injury to the public or complaints in which there is a risk that the complainant may die before the case is resolved.

Division's complaint queuing procedure, as presented, survives the rational basis test, as all it need do is "find some footing in the realities of the subject addressed by the law." *Beatie v. City of New York*, 123 F.3d 707, 712 (2d Cir. 1997) (citations omitted). The policy takes a logical approach to achieving Division's goals: it prioritizes complaints with a broader or more severe risk of injury for the public, and it offers special dispensation to persons with terminal illness. Plaintiffs' argument that the procedure fails to achieve its intended effect is immaterial. "We will not strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish." *Id.*

D. PRELIMINARY INJUNCTION

In *NOW I*, the court granted Plaintiff-NOW's request for a preliminary injunction enjoining Defendant Commissioner Mercado from implementing the 1995 Intake Rules because NOW established that it was likely to prevail on its claim that the rules violated NOW's members' due process rights by randomly barring complainants from filing claims with Division.[9] *See NOW I*, 182 F.R.D. at 42. Plaintiff now

9. The 1995 Intake Rules are 9 N.Y.C.R.R. §§ 465.1(1) & 465.3(c)(6). 9 N.Y.C.R.R. § 465.1(1) requires that complainant provide Division with "information sufficient to indicate that the [complainant] filing such verified document has been aggrieved by an unlawful discriminatory practice and has actual knowledge of the facts alleged." 9 N.Y.C.R.R. § 465.3(c)(6) provides that Division can reject a complaint when the intake worker believes the complaint is based on "mere speculation," "contradicts an inference of discrimination" or is "unbelievable on its face."

requests that the court convert the preliminary injunction into a permanent injunction and bar Defendant Mercado from resuming use of the rules.[10]

When a plaintiff requests an injunction to remedy a constitutional violation, the court "first consider[s] whether plaintiff has established the fact of a violation[;]" if so, the next question is "whether the plaintiff has demonstrated both the presence of a continuing irreparable injury and the lack of an adequate remedy at law." *Farmland Dairies v. McGuire*, 789 F. Supp. 1243, 1249 (S.D.N.Y. 1992) (Patterson, J.).

1. Proof of Constitutional Violation

The evidence presented at the preliminary injunction hearing established that the 1995 Intake Rules violated NOW's members' due process rights. This evidence was as follows: (1) statutes which showed that Division is by law required to accept a complaint from "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice," 18 N.Y. Exec. L. § 297.1, and to investigate the claim to determine "whether there is probable cause to believe that the person named in the complaint . . . has engaged or is engaged in an unlawful discriminatory practice." 18 N.Y. Exec. L. § 297.2a.; (2) evidence that prior to the 1995 Intake Rules, Division intake workers would accept any jurisdictionally correct and timely complaint submitted to

10. The court will not address NOW's claim that the 1995 Intake Rules violated equal protection standards and its contention that the rules were promulgated in violation of the Supremacy Clause. *See Alexander v. Keane*, 991 F. Supp. 329, 338 (S.D.N.Y. 1998) (Sotomayor, J.) (discussing the importance of judicial restraint).

Division, regardless of whether they were skeptical about the basis for the complaint (*Prelim. Inj. Tr.* at 315, 346); (3) proof that the 1995 Intake Rules, because of their ambiguous terms invited Division intake workers to speculate about the merits of potential claims; *see NOW I*, 182 F.R.D. at 40-41; (4) proof that under the 1995 Intake Rules workers turned away complaints based on their idiosyncratic opinions and speculations; *id*; (5) proof that ambiguities in the 1995 Intake Rules were never resolved in writing; *id.*; (6) evidence that workers received minimal training on how to implement the rules; *id.*; and (7) evidence that the training began months after officials began using the rules. *Id.* This evidence established that Division workers using these rules arbitrarily deprived persons of their property interest in their claims.

The evidence NOW presented at trial showed that the Intake Rules had great impact, and potentially deprived large numbers of persons of their discrimination complaints without cause. NOW presented trial evidence showing that 2,448 jurisdictionally correct and timely complaints were rejected under the 1995 Intake Rules, with no attempt being made to investigate these claims. (Tr. at 423-24). Additionally, NOW showed that Division turned away a substantial number of additional complaints for which they have no record. (Tr. at 981). If the court uses a conservative estimate, that 25% of the rejected claims were valid, it can reasonably be assumed that 625 more discrimination complaints would have been resolved under Division's original intake rules than were resolved under the 1995 Intake Rules.

Taken together, the facts presented at the preliminary injunction hearing and at trial establish that Division's 1995

Intake Rules, 9 N.Y.C.R.R. §§ 465.1(1) & 465.3(c)(6), deprived NOW members of their federally protected property interest in having their discrimination complaints resolved through Division procedures because these rules entirely prevented large numbers of complainants with valid claims from submitting claims to Division.

2. Proof of Continuing Harm

Defendant Mercado argues that plaintiff's petition for a permanent injunction is moot; he argues that NOW cannot show that the 1995 Intake Rules present a threat of "continuing irreparable injury" to its members because he has begun to repeal the rules. *Farmland Dairies v. McGuire*, 789 F. Supp. at 1249. The court recognizes that "the Eleventh Amendment bars a retrospective declaration of a violation of federal law where there is no continuing violation to enjoin." *Marbley v. Bane*, 57 F.3d 224, 232 (2d Cir. 1995). However, "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case . . . . A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (citations omitted).

Based on these guidelines, the court concludes that plaintiff's request for an injunction is not moot. No evidence has been submitted to the court showing that the 1995 Intake Rules have been repealed. At the time of decision, the only evidence submitted on this issue was Deputy Commissioner Lind's testimony that Division was in the process of repealing the 1995 Intake Rules. (Tr. at 760). As of the date of judgment,

it remained unclear whether the rules had been fully repealed. Therefore, the court cannot assume that plaintiff's claim for injunctive relief has been mooted.

Furthermore, even if the 1995 Intake Rules have been repealed, Division officials' behavior during the course of this lawsuit suggests that there is an impending threat that defendant Mercado or his successor might later reimplement the 1995 Intake Rules. *Green*, 474 U.S. at 73. (explaining that a repealed law may be declared unconstitutional when defendant threatens to resume its use). The court takes note that defendant only voluntarily ceased using the 1995 Intake Rules after NOW amended its suit against Division to challenge the offending intake rules. The court also recognizes that defendant and other Division officials engaged in a pattern of unconstitutional conduct prior to this case, and therefore it is likely that, if an injunction is not issued, defendant or his successor will reimplement the 1995 Intake Rules, or some intake procedure functionally similar to them. *See United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952). For these reasons, the court concludes that there is a continuing need for a permanent injunction.

E. ABSOLUTE IMMUNITY

In their post-trial memorandum of law, for the first time, defendants Pataki and Cuomo raise the claim that they are entitled to absolute immunity from plaintiffs' claims; they argue that plaintiffs have improperly tried to sue defendants for their participation in protected legislative activities.

"Absolute immunity, because it detracts from section 1983's broadly remedial purpose, applies only to a limited

class of officials and functions." *Spear v. Town of West Hartford*, 954 F.2d 63, 66 (2d Cir. 1992). This kind of immunity fully protects officials from personal liability for the performance of certain discretionary acts. *Id.* Because absolute immunity offers officials such broad protection, courts typically limit its protections to legislators and prosecutors for the duties associated with their offices. *Id.* However, executive officials may qualify for its protections when they engage in prosecutorial and legislative kinds of duties. *Id.*

Defendants, however, have the burden of raising the absolute immunity defense in their initial and responsive pleadings, *cf. San Filippo v. United States Trust Co.*, 737 F.2d 246, 252 (2d Cir. 1984), as it is an affirmative defense. When they fail to do so, defendants waive their right to the defense. Fed. R. Civ. Proc. 8(c) (discussing affirmative defenses).

Court records show that the first time defendants raised the absolute immunity defense was in Defendants' Post Trial Memorandum of Law. Also, defendants have failed to show that they raised the defense in their initial responses to plaintiff's various claims. Because the record does not support defendants' claim that they timely raised their absolute immunity defense, the court concludes that the defense is waived.

F. APPROPRIATE RELIEF & FURTHER PROCEEDINGS

The district court has broad discretion to fashion equitable remedies for constitutional violations. *See Swann*

v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971). However, courts should refrain from fashioning relief that "intrude[s] unnecessarily on a state's governance of its own affairs," as the state has a strong need to maintain control over its fiscal operations. *Ass'n of Surrogates & Supreme Court Reporters Within New York v. New York*, 966 F.2d 75, 79 (2d Cir. 1992). The court may impose a remedial order on the state that has financial costs, so long as compliance with the order is not unduly burdensome or costly; *see Dean v. A. Coughlin*, 804 F.2d 207, 214-15 (2d Cir. 1986), however, the prudent course is to allow a state to offer a remedial plan and improve upon it as necessary. *Id.*

Defendants are hereby enjoined from taking or continuing to take any action in violation of plaintiffs' Fourteenth Amendment due process rights. By way of remedy for the constitutional violations identified in this opinion, the court orders defendants to meet with plaintiffs and to forthwith commence formulation of a Joint Remedial Plan. Without intending to impinge upon the initial responsibility to formulate the plan, which predominately lies with Division officials, the court notes that the remedial plan, in order to address the constitutional violations identified in this opinion, must cover the areas proposed in this section, and include appropriate financial data as specified. The Remedial Plan must include:

> -1- the projected staff and funding necessary for Division to process claims within 24 to 36 months, assuming Division receives a new case load of 5, 474 complaints each year;

-2- the projected staff and funding necessary for Division to permanently finance a special Backlog Case Unit that would automatically perform expedited case processing for all claims pending at Division for more than three years;

-3- proposed Division policies and programs that will ensure the integrity of plaintiffs' claims while they are pending at the Division. These policies may include programs designed to: timely depose complainants' witnesses and preserve their statements for the record; [including microfilming, recording, or warehousing complainants' documentary and testimonial evidence]; and more aggressively locate complainants' and witnesses' forwarding address information [including the use of a people locator service];

-4- proposed procedures that permit persons whose claims have been erroneously subject to ACD to appeal the ACD;

-5- anticipated funding sources that can be tapped to cover the costs of the aforementioned policy and staff changes.

The court recognizes that plaintiffs and defendants may fail to agree on certain aspects of the Joint Remedial Plan. Should this contingency occur, each side may submit individually proposed portions of the plan to the court.

In addition to their duty to participate in the formulation of the remedial plan, Division officials are enjoined from engaging in the following actions:

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-1- implementing, 9 N.Y.C.R.R. §§ 465.1(1) and 9 N.Y.C.R.R. § 465.3(c)(6), because these rules violate complainants' due process rights by barring them from submitting claims to Division;

-2- from singularly relying on United Postal Service mail forwarding procedures to locate complainants who face ACD determinations; defendants are required to use the Internal Revenue Service Mail Forwarding Service to locate persons whose claims are at risk for ACD, or an equivalent substitute;

-3- from using the Division ACD notification letter in circulation after April 11, 1991, because the letter provides insufficient notice to complainants that they are at risk for ACD; defendants must submit a new ACD notification letter for court review which unambiguously informs parties that their claims will be subject to ACD if they fail to respond to the letter, and that they have a right to appeal an ACD; defendants must also create a post-ACD determination letter informing complainants that their claims have NOW BEEN DISMISSED and notifying complainants of their right to appeal the ACD. The ACD notification letters should be mailed to an address for the complainant identified by the Internal Revenue Service Mail Forwarding Service;

-4- defendant Commissioner Mercado must vacate all cases dismissed under the "failure to locate," and "failure to cooperate," ACD designations, and restore these complainants to the position they previously had in Division's adjudicatory process;

-5- Division must submit to the court the letter it will use to inform persons whose claims were dismissed under the ACD policy that they have the right to resubmit their claims.

Plaintiffs in subclass A with pending claims are entitled to the injunctive and declaratory relief provided above; Subclass A members with finally dismissed complaints may bring money damage claims against defendants. Plaintiffs' counsel must submit a methodology for identifying these plaintiffs. Plaintiffs in subclass C, because they are represented by NOW in this action, are entitled to declaratory and injunctive relief for the injuries caused by Division's ACD process.

The court retains jurisdiction to enforce, modify, or rescind the provisions of the aforementioned injunctions.

IT IS SO ORDERED.

Dated: New York, New York
October 26, 1999

s/ Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JULY 24, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 7146 (RLC)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al., on behalf of themselves, their members, and all others similarly situated, and CLARICE SEEGARS, JANE DOE, DELLIE BRITT and BERNADETTE THOMAS, on behalf of themselves, and all others similarly situated,

Plaintiffs-Intervenors,

– against –

MARIO CUOMO, individually and as former Governor of the State of New York, MARGARITA ROSA, individually and as former Commissioner of the Division of Human Rights of the Executive Department of New York State, GEORGE PATAKI, individually and as Governor of the State of New York, and EDWARD MERCADO, individually and as Commissioner of the Division of Human Rights of the Executive Department of New York State,

Defendants.

OPINION

* * *

Appendix C

ROBERT L. CARTER, District Judge

This is a class action against defendants arising from constitutional violations allegedly committed by the New York State Division of Human Rights ("SDHR" or the "Division"). The plaintiffs-intervenors seek a declaratory judgment, injunctive relief, and damages.

Defendants now move to dismiss the damage claims, pursuant to Rule 12(c), F.R. Civ. P., on grounds of qualified immunity. Alternatively, defendants ask the court to dismiss the damage claims asserted against defendant Mercado ("Mercado") under the doctrine of absolute legislative immunity.

I. Background

The background of this controversy is set forth in a previous opinion of this court, *New York State Nat'l Org. for Women v. Cuomo*, No. 93 Civ. 7146, 1998 WL 157029 (S.D.N.Y. Apr. 3, 1998) (Carter, J.), with which familiarity is assumed.

The present motion is made in response to the court's opinion of April 3, 1998, granting, *inter alia*, plaintiffs-intervenors' motion for leave to amend the complaint by adding claims against the defendants in their personal capacities. *Cuomo*, 1998 WL 157029 at *5.

On April 3, 1998, and April 6, 1998, the plaintiffs-intervenors filed amended and supplemental complaints. These complaints included claims against the defendants in

their individual capacities on the grounds that the defendants are and were aware that the practices challenged in this suit violate(d) the constitutional rights of the plaintiffs-intervenors. (NOW Cmplt. at ¶¶ 30-35, 37-47, 50-51, 53; Seegars Cmplt. at ¶¶ 29-34, 36-45).

The plaintiffs-intervenors' damage claims are based on New York Executive Law (the "Human Rights Law"), which permits any person claiming to be aggrieved by an unlawful discriminatory practice to file a complaint with the SDHR, and which provides an administrative process for resolving complaints of discriminatory practices within specific time periods. (NOW Cmplt. at ¶¶ 18-28; Seegars Cmplt. at ¶¶ 22-28). Plaintiffs-intervenors argue that this law creates an entitlement that constitutes a property right that is protected by the Fourteenth Amendment. (NOW Cmplt. at ¶ 28; Seegars Cmplt. at ¶ 28).[1] Specifically, the amended and supplemental complaints allege that the defendants have violated the due process and equal protection rights of the plaintiffs-intervenors by

> permitting protracted administrative delays in the processing, investigation, and resolution of unlawful discrimination complaints, so egregious

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1. In his Report and Recommendation, dated May 19, 1995 (the "Initial Report"), Magistrate Judge James C. Francis, IV found that plaintiffs had sufficiently established that the Human Rights Law creates an entitlement to have discrimination complaints heard without prejudicial delay, thereby providing complainants with a property right protected by the Fourteenth Amendment. (Initial Report at 45). This court adopted the magistrate's finding. *See Cuomo*, 1998 WL 157029 at *12.

> that their rights established by the state [pursuant to the Human Rights Law] may be extinguished, by, among other things, dismissal of their cases, because of prejudice to respondents, as a matter of law or fact, and dismissal because the delays have impaired and impeded their ability to prosecute or prove all or part of their claims.

(NOW Cmplt. at ¶ 3; Seegars Cmplt. at ¶ 3); *see also* (NOW Cmplt. at ¶¶ 4, 28; Seegars Cmplt. at ¶ 7, 8, 28). Additionally, plaintiffs-intervenors claim that Mercado has violated their rights under the Supremacy Clause by "promulgating and implementing new rules and regulations which authorize employees of SDHR to refuse to accept complaints of aggrieved persons alleging unlawful discriminatory conduct under the Human Rights Law. . . ." (NOW Cmplt. at ¶ 28).

Defendants claim that they were and are unaware that the practices challenged in this suit violate(d) the constitutional rights of the plaintiffs-intervenors. (Defs.' Mem. of Law at 2). Therefore, they argue, they are entitled to qualified immunity from the damage claims brought against them by the plaintiffs-intervenors as a matter of law. *Id.* Defendants also argue that Mercado is entitled to absolute legislative immunity from the damage claims as a matter of law because of the protection afforded to public officials acting in a legislative capacity. *Id.*

Appendix C

II. Analysis

A. Relevant Standard

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court ruled that a government official who is sued in his individual capacity is entitled to qualified immunity from liability for civil damages if the alleged unlawful conduct did not violate "clearly established constitutional or statutory rights." *Id.* at 818.

The standard established in *Harlow* is an objective one. *Id.* at 818-19. Whether the relevant law is clearly established does not turn on an official's state of mind or subjective belief. *See e.g. Crawford-El v. Britton*, __ U.S. __, 118 S.Ct. 1584, 1592 (1998) ("Evidence concerning the defendant's subjective intent is simply irrelevant to [the qualified immunity defense]."). Rather, the court must ascertain whether "in light of pre-existing law the unlawfulness [of the alleged conduct] is apparent." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *see also Crawford-El*, 118 S.Ct. at 1593 ("[I]t is not unfair to hold liable the official who . . . should know he is acting outside the law.") (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). To grant qualified immunity "no rational jury could fail to conclude that it was reasonable" for the defendant officials to believe that their conduct was lawful. *LaBounty v. Coughlin*, 137 F.3d 68, 74 (2d Cir. 1998) (internal quotation marks omitted). Thus, in qualified immunity analysis, the court's inquiry consists of a determination as to whether a defendant official reasonably could have expected that his action was consistent with established legal principles, or conversely, whether he

reasonably should have known that his action was taken in disregard of the law. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *Davis v. Scherer*, 468 U.S. 183, 194-96 (1984); *Crawford-El*, 118 S.Ct. at 1597.

The court's evaluation of whether relevant law is "clearly established" is made on the basis of Supreme Court precedent and the law of this circuit. *See Zelder v. Holloway*, 510 U.S. 510, 516 (1994) (citing *Davis*, 468 U.S. at 192, n.9); *see also Russell v. Scully*, 15 F.3d 219, 223 (2d Cir. 1993). Although violation of state rules or regulations may inform the court's analysis of a qualified immunity defense, the defense may only be defeated by the court's determination that the official violated "clearly established" federal law. *See Davis*, 468 U.S. at 193-96 & n.14.

B. Application of the Standard

The parties disagree fundamentally on the threshold question of what law governs the conduct challenged in this litigation. Thus, initially the court must determine what law is applicable to the case. *See Harlow*, 457 U.S. at 808, 818 ("[T]he judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.").

The defendants' definition of plaintiffs-intervenors' claims, and thus the rights at issue, is exceedingly specific. They cite a single case, *Polk v. Kramarsky*, 711 F.2d 505 (2d Cir.), *cert. denied*, 464 U.S. 100 (1983), as controlling authority, (Defs.' Mem. of Law at 12), claiming that *Polk*

stands for the proposition that SDHR's delay in processing complaints cannot constitute a Fourteenth Amendment violation if an avenue remains (at SDHR or another tribunal) through which a claimant can pursue his discrimination complaint. (Defs.' Mem. of Law at 12).

In *Polk* the appellant argued that SDHR's seven year delay in processing his employment discrimination claim, which had been deferred to the agency by the Equal Employment Opportunity Commission ("EEOC)," gave rise to a claim under the state's Human Rights Law, 42 U.S.C. § 1983, and Title VII, 42 U.S.C. § 2000e, for violation of his Fourteenth Amendment right to due process. In support of his claim, the appellant relied primarily upon *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), in which the Supreme Court held that the right to use a state's adjudicatory procedures was a form of property that could not be "finally destroy[ed] without first giving the putative owner the opportunity to present his claim of entitlement." *Id.* at 431.

The Second Circuit ruled that Polk's due process rights had not been violated by the Division's delay because his action had survived, albeit long delayed. *Polk*, 711 F.2d at 509. The Court reached this conclusion because Polk had brought a Title VII action against his former employer, then pending in federal court: given the pending claim, Polk could not logically claim that he had actually been prejudiced by the Division's conduct. *Id.* That is, Polk was not in the position to establish actual prejudice prior to learning the outcome of the Title VII case. *Id.* Therefore, the Court held, the principle enunciated in *Logan* was inapplicable. *Id.* at 508-09. For whereas *Logan* involved a "state law [that]

completely deprived a claimant of an opportunity to pursue a discrimination claim," Polk's property interest had not been altogether destroyed. *Id.* Thus, it was unclear whether he had suffered as a result of SDHR's actions.

Noting the significance that the Second Circuit placed on Polk's inability to demonstrate actual prejudice to his discrimination claim, plaintiffs-intervenors argue that *Polk* is distinguishable from this case. Unlike Polk, many of their state law claims "have been finally destroyed, in whole or in part"; or the Division's policies and practices have placed their claims in a "zone of risk whereby they face complete or partial extinguishment of all or part of their claim." (Plfs.' Mem. of Law at 7).

One point of consensus is apparent from the parties' submissions: that in the Second Circuit it is "clearly established" law that the Division's *complete* destruction of a party's right to pursue a discrimination claim would constitute a Fourteenth Amendment violation. (Defs.' Mem. of Law at 12; Plfs.' Mem. of Law at 9-10). Proceeding from this consensus to ascertaining what law governs qualified immunity analysis, the court finds that important distinctions exist among the members of the plaintiff-intervenor class. These distinctions relate to the basis upon which, or whether, the Division has disposed of the discrimination complaints that these individuals brought pursuant to the Human Rights Law.

1. Cases to Which Polk Applies

Upon review of the record in this case, the court concludes that the claims of some plaintiffs-intervenors have

not been destroyed by the Division's practices. These include all claims that currently are pending before SDHR, whether initiated before or after SDHR's new intake procedures were promulgated (that is, either prior to or after November 3, 1995). These claims also include those that were dismissed for "failure to cooperate."

a. Pending Cases

For plaintiffs-intervenors whose claims fall into the "pending" category, the possibility continues to exist that the claims that they have brought pursuant to the Human Rights Law will be investigated, and that they can be made whole by injunctive relief or damages. Like the appellant in *Polk*, these parties continue to have an avenue through which to pursue their complaints (i.e. SDHR). *See Polk*, 711 F.2d at 509. Therefore, their claims cannot be deemed "extinguished." Thus, *Polk* governs the disposition of the claims of these individuals.

Defendants are entitled to qualified immunity against the damage claims of this category of the plaintiff-intervenor class even though precedent may exist that suggests that the protections afforded by the Fourteenth Amendment may attach prior to the final destruction of a property interest. (Plfs.' Mem. of Law at 9, n.5) (citing, for example, *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917)). In fact, precisely because the Second Circuit's ruling in *Polk* contravenes this line of cases, defendants' qualified immunity defense is strengthened. *Polk* necessarily implies that applicable law in this Circuit is not clear on the question of whether conduct

by the Division that nearly destroys, but does not actually destroy a claimant's opportunity to be heard, violates due process. In other words, in this Circuit the distinction that *Polk* made to *Logan v. Zimmerman*, 455 U.S. 422 (1982), controls the result for those who may still obtain relief. *See Polk*, 711 F.2d at 509 ("Here, Polk's right of action has survived, albeit long delayed. *Logan* is therefore distinguishable.").

b. Cases Dismissed for "Failure to Cooperate"

"Failure to cooperate" dismissals resulted from parties' failure to respond to the Division's requests for information or to appear for a scheduled appointment. *See* Barbara Riley Shaw & Lawrence A. Wizman, N.Y. State Div. of Human Rights, Bureau of Regional Affairs Standard Operating Procedures (April, 1993). Thus, these complainants bear responsibility for the Division's action regarding their claims and cannot make a credible case of suffering actual prejudice as a result of the Division's practices and policies.

Similar to those whose claims are pending before SDHR, the classes of individuals in this category are controlled by *Polk*, and under the objective test established by *Harlow*, 457 U.S. at 818-19, the defendants are entitled to qualified immunity against the claims of these individuals.

2. Cases to Which Polk Does Not Apply

Unlike the appellant in *Polk*, certain plaintiffs-intervenors no longer are able to pursue the complaints that they brought pursuant to the Human Rights Law. These

parties may include, but may not be limited to those whose complaints were dismissed for "failure to locate," by court order due to the Division's delay in processing them, because of respondents' bankruptcy, or by staff prior to "probable cause" hearings.

Because these parties may be able to demonstrate at a trial on the merits that they actually have been prejudiced by SDHR's dilatory or arbitrary practices and policies, they assert a different claim than the appellant in *Polk*. Whereas Polk continued to have an avenue for pursuing his discrimination claim despite the Division's delay in processing his claim, the Division's delay or arbitrary decision making may have altogether extinguished their ability to pursue their rights under the Human Rights Law. In this way, the claims of these parties are factually distinguishable from that asserted in *Polk*, rendering *Polk* inapplicable to the court's analysis of whether these individuals may sue defendants for damages.

a. The Applicable Standard

The Supreme Court's ruling in *Logan v. Zimmerman Brush Co.*, 455 U.S. at 434, that "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement" controls the court's qualified immunity analysis regarding the damage claims of these parties. The question before the court is whether, under the objective standard established in *Harlow v. Fitzgerald*, 457 U.S. at 818-19, the defendants should have known that the policies and practices that may have resulted in actual prejudice to and extinguishment of

these parties' claims under the Human Rights Law were unlawful under *Logan*.

Claiming that *Logan* is factually distinguishable from the scenario presented here and that its holding is "too generalized" to control the outcome of this case, defendants rely upon two district court cases to support their contention that *Polk* is dispositive of the issues raised in the instant action, (Defs.' Mem. of Law at 13-14) (citing *Baba v. Warren Management Consultants Inc.*, 882 F. Supp. 339, 342 (S.D.N.Y.) (Batts, J.), *aff'd* 89 F.3d 826 (2d Cir. 1995); *Moore v. United States*, 609 F. Supp. 682, 684 (E.D.N.Y. 1985)), as well as state law that stands for the proposition that "without the gravest actual prejudice, delays did not deprive litigants before the agency of due process of law." (Defs.' Mem. of Law at 14) (citing *Diaz Chemical v. New York State Div. of Human Rights*, 91 N.Y.2d 931 (1998)).

State law does not control the court's analysis of the Fourteenth Amendment due process issues presented here, however. *See* 28 U.S.C. § 1652 (1994) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil cases in the courts of the United States, in cases where they apply"); *Vitek v. Jones*, 445 U.S. 480, 491 (1980) ("[M]inimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."); *Cohen v. Beneficial Indus. Loan Co.*, 337 U.S. 541, 547 (1949) ("[A] federal court would not give effect, in either

a diversity or nondiversity case, to a state statute that violates the Constitution of the United States."). The court must look to Supreme Court and Second Circuit precedent in evaluating whether the law relevant to the constitutional issues raised here is "clearly established" for qualified immunity purposes. *See Zelder v. Holloway*, 510 U.S. 510, 516 (1994) (citing *Davis v. Scherer*, 468 U.S. 183, 192, n.9 (1984)); *Russell v. Scully*, 15 F.3d 219, 223 (2d Cir. 1993)).

Based upon the Supreme Court's decision in *Logan*, the court finds that the reasonable government official should have known that the Division's actions violated the Fourteenth Amendment rights of the categories of plaintiffs-intervenors delineated *supra*, page 11.[2] First it is important to note that *Logan* and the instant action involve the same kind of underlying state law claim. At issue in *Logan* was an appellant's employment discrimination claim, which was brought pursuant to the Illinois Fair Employment Practices Act ("FEPA") and filed with the Illinois Fair Employment Practices Commission ("FEPC"). The FEPA, which bars, *inter alia*, discrimination in real estate and financial transactions, as well as in public accommodations and employment, *Logan*, 255 U.S. 422, 425 & n.1 (citing Ill. Rev. Stat., ch. 48, ¶ 851 et seq. (1979), amended by 1980 Ill. Laws, P.A. 81-1267) is analogous to the New York Human Rights Law, which also bars, *inter alia*, discrimination by real estate agents and in the application for and extension of credit, as well as in public accommodations and employment. *See* N.Y. Exec. Law, Art. 15, § 296 (McKinney's 1993). Moreover,

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2. This finding is modified by the requirement that these complainants must have attempted to take advantage of federal anti-discrimination provisions. *See infra*, pp. 27-28.

SDHR is analogous to the FEPC.[3] Therefore, the Court's holding in *Logan* that the FEPC could not prevent Logan from pursuing his claim under the FEPA without according him due process of law should apply equally to the SDHR and claims brought by parties pursuant to the Human Rights Law.

Logan also controls the instant action for qualified immunity purposes because the manner in which the FEPC prevented Logan from asserting his rights under the FEPA is analogous to the manner in which the parties in the instant action allegedly are denied their ability to proceed under the Human Rights Law. That is, Logan argued that the FEPC's dismissal of his FEPA claim because of its own failure to convene a timely factfinding conference for the collection of evidence violated his Fourteenth Amendment Rights. *Logan*, 455 U.S. at 427. Ruling on Logan's behalf, the Court held that the cause of action created by the FEPA could not be destroyed by the state — due to inadvertent delay or any other policy or practice — without giving Logan an opportunity to present his claim of entitlement. *Id.* at 433. Similarly, *Logan* implies that the SDHR cannot thwart the investigation or resolution of claims brought pursuant to the Human Rights Law — whether by delay or any other means.

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3. In fact, subsequent to the commencement of the litigation in *Logan* but prior to the rendering of the Court's decision in that case, Illinois replaced the FEPA with the more comprehensive "Illinois Human Rights Act," and replaced the FEPC with two agencies, a "Department of Human Rights" and a "Human Rights Commission." *Logan*, 255 U.S. at 425 n.1. Thus, the nomenclature used by the states of New York and Illinois for their anti-discrimination agencies and the protections afforded by their anti-discrimination statutes is now virtually indistinguishable.

Appendix C

b. Other Relevant Precedent

Although *Logan* is a sufficient basis for the court's finding that the law relevant to this action was clearly established for purposes of evaluating defendants' qualified immunity defense, other relevant precedent supports this conclusion. Well-established case law concerning whether administrative delay that results in arbitrary decision may violate a party's constitutional rights also compels the conclusion that defendants should have known that the Division's practices were inconsistent with federal due process norms. This jurisprudence stands commandingly for the proposition that administrative delay in decision making processes that prejudices a citizen's substantive constitutional or statutory rights may violate the due process clause.

While there is "no bright-line rule . . . for determining when a delay is so burdensome as to become unconstitutional," *Kraebel v. New York City Dept. of Housing Preservation and Development*, 959 F.2d 395, 405 (2d Cir. 1992), the Supreme Court acknowledged as early as 1926 that delay is an element to be considered by courts in evaluating the constitutionality of administrative procedures that affect substantive rights. *See Smith v. Illinois*, 270 U.S. 587, 591 (1926) ("Property may be as effectively taken [in violation of the Fourteenth Amendment] by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them . . . ."); *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (requiring notice and "opportunity to be heard" before seizure of property). An even stronger early formulation of the principle that delay is relevant to Fourteenth Amendment

analysis appeared in *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), in which the Court held that the due process clause requires the opportunity to be heard "at a meaningful time and in a meaningful manner."

The criterion of delay then was incorporated into the familiar balancing test established by Court in *Mathews v. Eldridge*, 424 U.S. 319, 341 (1976), for evaluating the procedural constraints imposed upon officials by the Fourteenth Amendment. " '[T]he possible length of wrongful deprivation . . . is an important factor in assessing the impact of federal action on the private interests,' "). *Id.* at 341 (quoting *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975); *see also id.* at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' ") (quoting *Armstrong*, 380 U.S. at 552). Moreover, in 1979 the Court held that delay constitutes a violation of due process at a definable point, *Barry v. Barchi*, 443 U.S. 55, 66 (1979), by explicating the concept of "meaningful time." "To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a suspension can still be avoided. . . ." *Id.* at 74. *See also Cleveland Brd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) ("minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse federal action") (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)).

The Second Circuit has followed the Court's analysis of the potential due process consequences of delay. *See Kraebel*

v. New York City Dept. of Housing Preservation and Development, 959 F.2d 395, 405 (2d Cir. 1992) (" '[I]mplicit in the conferral of an entitlement is a further entitlement, to receive the entitlement within a reasonable time.' ") (quoting *Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir. 1991); *Kraebel*, 959 F.2d at 405 ("[D]elay in processing can become so unreasonable as to deny due process."); *Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir. 1989); *United States v. Laurenti*, 581 F.2d 37, 42 n.15 (2d Cir. 1978) ("[i]n civil cases, failure to provide a prompt hearing as to the property seized raises due process considerations"); *G.I. Distributors v. Murphy*, 469 F.2d 752, 756-57 (2d Cir. 1972) (holding that administrative delay in granting hearing after seizure of magazines was not extended and thus did not violate due process) (citing *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373 (1971) (plurality) (reading into 19 U.S.C. § 1305(a) a requirement that forfeiture proceedings be commenced within 14 days and completed in 60 days of their commencement)).[4]

As the leading case on the procedural constraints generally imposed by the Fourteenth Amendment, *Mathews v. Eldridge*, 424 U.S. 319 (1976), provides particularly

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4. The Second Circuit's precedent on the constitutional implications of administrative delay has been remarkably consistent with the Supreme Court's jurisprudence on this issue, so much so that the decision reached in *Polk v. Kramarsky*, 711 F.2d 505 (2d Cir. 1983), seems aberrant. In fact, it is unclear that the outcome in *Polk* that was reached by the Circuit Court in 1983 would be the same if the case were decided by the Court of Appeals today. However, it is not for this court to make a determination about the precedential value of *Polk*.

important guidance in assessing the strength of defendants' qualified immunity defense. In *Eldridge* the Supreme Court established a balancing test for evaluating officials' obligations under the Fourteenth Amendment. The *Eldridge* test directs courts to consider three factors when determining whether administrative procedures are constitutionally adequate. These include the governmental interest in using the procedure in question; the private interest affected by the procedure; and the risk of an erroneous deprivation of the private interest imposed by use of the challenged procedure, along with the probable value of substitute or additional procedural safeguards. *Id.* at 335.

Significantly, the Division's interest in using the procedures challenged by plaintiffs-intervenors in the case at bar is unclear at best, and at worse, unconvincing. No adequate justification has been offered by the Division for its use of the challenged policies and practices, *New York State Nat'l Org. for Women v. Cuomo*, No. 93 Civ. 7146, 1998 WL 157029 at *10, *12 (S.D.N.Y. Apr. 3, 1998) (Carter, J.) (rejecting justification of procedures on grounds that they protect against "vexatious and unnecessary governmental investigation"), although defendants have offered the standard rationales for pursuing a qualified immunity defense to the damage claims arising from them. (Defs'. Mem. of Law at 6-7) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) (qualified immunity protects against "costs associated with the defense of damage actions" and shields officials from "baseless lawsuits"); *Crawford-El v. Britton*, 118 S. Ct. 1584, 1593 (1998) ("social costs" of subjecting officials to damages liability include "diversion of official energy from pressing public issues, and the deterrence of able

citizens from acceptance of public office")). In fact, the record shows that on several occasions New York state officials themselves have criticized the policies and practices that form the basis of this action.

> In the Division's 1984 Annual Report to the Governor, Commissioner Douglas White, referring to the backlog wrote, ". . . the Division believes strongly that 'justice delayed is justice denied,' and raises fundamental due process issues." . . . Defendant Rosa, in commenting on the elimination of positions created to reduce the Division's case backlog wrote, ". . . justice for complainants would be delayed to the point of making a mockery of our purposes, and the agency would rightfully be publicly viewed as an ineffective forum for receiving any meaningful redress." . . . [I]n 1993 defendant Cuomo, in referring to the initiation of a mediation program by the Division stated: "When someone has felt the sting of discrimination, justice delayed can be justice denied."

(Plfs.' Mem. of Law at 4, n.1) (citations omitted).

Moreover, the state law reporters abound with pronouncements by judges that SDHR's delays in processing discrimination complaints are unreasonable, even though they have not found the Division's practices unlawful under New York law.

> This Court[ ] . . . rightly decries, once again, the persistently inordinate delays in [SDHR's]

> discharge of its duties to investigate and resolve discrimination claims. . . . [SDHR's] well-intentioned but embarrassing yearnings [to improve the systemic problem] continue to resound entirely hollow, however, against the thump of the empirical facts and trend lines. They are worsening . . . so the assurances lack any track record on which to peg reliability.

See Diaz v. New York State Div. of Human Rights, 91 N.Y.2d 932, 934 (N.Y. Ct. App. 1998) (concurrence); *id.* at 933 ("[W]e reiterate our serious concern about the negative systemic effects of the agency's protracted delays."); *Corning Glass Works v. Ovsanik*, 84 N.Y.2d 619, 622 (1994) (8 1/2 year delay in processing complaint was "inordinate"); *cf. Polk v. Kramarsky*, 711 F.2d 505, 507 (2d Cir. 1983) ("[I]t is clear that the more than seven-year period between the filing of the complaint . . . and its ultimate dismissal violated both the spirit and the letter of the procedural provisions [of the Human Right Law that set directory time limits]"). Thus, far from being justified, the policies and practices at issue in this case are believed indefensible by many significant parties. Under these circumstances, the government's interest in using the challenged procedures is weak.

The private interest affected by the Division's practices is that involved in deterring and being free of discrimination that is shared by the plaintiffs-intervenors and society, generally. In fact, this interest is a bedrock constitutional principle, a right protected by federal statutory and constitutional law, as well as the state constitution and statutes at issue in this case. *See e.g.* U.S. CONST. amend.

XIV, § 2 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); 42 U.S.C. § 1983 (1988) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.") N.Y. CONST. art. 1, § 11 (1982) ("No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state."); N.Y. Exec. Law, § 291(1) (McKinney's 1993) ("The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sex or disability or marital status is hereby recognized as and declared to be a civil right."). Given the numerous sources of authority upon which the private interest asserted here is based, it is obviously a powerful one.

That the private interest is strong and the countervailing governmental interest is comparatively weak is made evident by statistics revealing the average amount of time that the Division takes to process complaints, *Cleveland Brd. of Educ. v. Loudermill*, 470 U.S. 532, 557 (1984) ("[T]he constitutional analysis of delay requires some development of the relevant factual context when a plaintiff alleges ... that the administrative process has taken longer than some minimal amount of time."), which brings us to a consideration of the third *Eldridge* factor. These statistics demonstrate that

the social costs of the Division's practices are substantial and permanent, in many instances.

According to the record, the Division dismissed 5,152 for administrative convenience ("AC'd") for failure to locate, failure to cooperate and bankruptcy of the respondent between October 15, 1990 and April 10, 1998. (Plfs.' Mem. of Law at 12). Of that number, 2,624, or 51%, were AC'd three or more years after their complaints had been filed. *Id.* The mean and median number of days from date of filing to date of closing for failure to locate was 1,197 and 1,151 days, respectively, with the longest number of days elapsed being 6,314. *Id.* For cases closed because of bankruptcy, the mean and median number of days elapsed was 1,057 and 1,036, respectively, with the longest number of days elapsed being 4,838 days. *Id.* Some cases were dismissed under these categories after a probable cause hearing. The mean and median number of days elapsed with respect to these cases were 2,585 and 2,635, respectively, with 5,585 being the most days elapsed. *Id.* For cases closed at the hearing level for bankruptcy, the mean and median number of days elapsed was 2,233 and 2,249, respectively, with the longest number of days elapsed being 4,365. *Id.* at 13.

Under these circumstances, the risk to citizens of erroneous deprivation of rights that is occasioned by the Division's policies and practices, and the value of using different procedures, is clear. The delays in resolving and ultimate dismissal of thousands of complaints represent opportunities lost for thousands of citizens to pursue their substantive rights under the Human Rights Law. For these individuals, SDHR's policies and practices are likely to have

caused irreparable harm. *See New York State Nat'l Org. for Women v. Cuomo*, No. 93 Civ. 7146, 1998 WL 157029 at *7, *12 (S.D.N.Y. Apr. 3, 1998) (Carter, J.). Thus, these delays and dismissals have undermined the legislature's purpose in enacting the Human Rights Law and the directory time periods, *Sarkisian Brothers Inc. v. State Div. of Human Rights*, 48 N.Y.2d 816, 818 (1979), contained in those laws for investigating and resolving citizens' complaints. The Division's practices show disregard for the legislature's intent that discrimination complaints brought under the Human Rights Law be resolved promptly, or within one year and three months of their filing. *See* N.Y. Exec. Law §§ 297(2)(a), (4)(a)(c).

On these facts, the *Eldridge* balancing test clearly favors the private interest in deterring and being free of discrimination over the government's interest in using the challenged procedures. Moreover, within the context of the *Eldridge* balancing test, the federal precedent described *supra* which holds that administrative delay may violate due process, and the Supreme Court's ruling in *Logan v. Zimmerman Brush Co.*, 455 U.S. at 434, that a cause of action under state human rights law constitutes property interest that cannot be finally destroyed without first giving the putative owner an opportunity to present his claim of entitlement, the court finds no difficulty in concluding that the "clearly established constitutional or statutory rights" requirement of *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), is satisfied. These same sources of authority compel the conclusion that the defendants should have known that the Division's policies and practices unlawfully prejudiced the substantive rights of the categories of plaintiffs-

intervenors described *supra* page 11. Therefore, defendants are not immune from the damage claims brought against them by these individuals. *Butz v. Economou*, 438 U.S. at 506; *Harlow*, 457 U.S. at 818-19.

Defendants' argument to the contrary is based on a characterization of the plaintiffs-intervenors' claims at an exceedingly and inappropriately high level of specificity. This mischaracterization of the right at stake enables the defendants to conflate the right with the Division's conduct. That is, the right at issue in this case is properly defined as the plaintiffs-intervenors' constitutionally protected interest in being heard "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), prior to the state's deprivation of their substantive anti-discrimination rights under the New York Human Rights Law. As demonstrated above, the *Manzo* principle has been affirmed and expanded by the Supreme Court, and followed by the Second Circuit both prior to and after the ruling in *Polk v. Kramarsky*, 711 F.2d 505 (2d Cir. 1983). Reasoning from *Polk*, however, the defendants define the right at stake not in terms of the plaintiffs-intervenors, but as the Division's putative constitutional license to be dilatory in processing complaints brought pursuant to the Human Rights Law. *See* Defs.' Mem. of Law at 12-13 ("[E]ven extreme delays at SDHR *are* permissible under the Fourteenth Amendment;").

Such a narrow definition of the right misapprehends the protections afforded to plaintiffs-intervenors by the due process clause, and thereby, the scope of an official's right to be qualifiedly immune from damage suits. The illogic and unfairness of defendants' way of reasoning about the

propriety of plaintiffs-intervenors' damage claims is apparent. Under defendants' scheme, even the most egregious failure on the part of the Division to investigate complaints under the Human Rights Law (for example, a twenty-eight year delay in processing a complaint)[5] could not support a suit against state officials in their individual capacities because no court has expressly recognized an individual's right to challenge delays by SDHR in processing complaints that prejudice his ability to pursue the Human Rights complaint.

The result of defendants' reasoning is a "Catch 22" that is unacceptable under Supreme Court and Second Circuit precedent. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("the very action in question" need not previously have been unlawful for the law to be "clearly established" for purposes of qualified immunity analysis); *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994) (holding that official's argument that law was not clearly established for qualified immunity purposes because "there is no reported decision that expressly forbids [his action]" was without merit).

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5. The hypothetical doubles the longest delay on record by the Division in processing a complaint under the Human Rights Law — a 14 year delay in processing a woman's claim that she was unlawfully terminated by her employer due to her pregnancy. *Diaz v. New York State Division of Human Rights*, 91 N.Y.2d 932, 934 (N.Y. Ct. App. 1998) ("The combined 14-year gap in this case from complaint to decision presents only the most extreme fact pattern, thus far brought to this Court's attention and docket").

Appendix C

c. Others Entitled to Sue for Damages

Those whose awards were reduced because of the Division's practices and policies also may sue defendants for damages. These are individuals who successfully pursued their claims, but whose awards were reduced by court order or by Commissioner Rosa due to SDHR's delay in processing their complaints.

On the preceding logic, these individuals are entitled to retroactive damages relief should plaintiffs-intervenors' suit against the defendants be successful. Like those categories of plaintiffs-intervenors described *supra*, page 11 who may have been actually prejudiced by the Division's dilatory processing of their complaints, these individuals have suffered as a result of SDHR's conduct. *See State Univ. Agric. and Technical College at Farmingdale v. State Div. of Human Rights*, 134 A.D.2d 339, 340 (2nd Dept 1987) (reducing back pay by six years) ("Absent any other indication in the record, it can only be concluded that the delay was attributable to the Division. The award of back pay unlawfully penalizes the petitioner [employer] for the division failure to act in a timely manner."); *State Div. of Human Rights v. Massive Econ. Neighborhood Dev. Inc.*, 47 A.D.2d 187, 189 (1st Dept. 1975) (eliminating pre-order interest due to "dilatory ways of the Division.").

Equity requires that they be able to recover their loss from those who are directly responsible for the reduction in their awards. These individuals cannot otherwise be "made whole," which is the remedial aspiration when citizens suffer unlawful discrimination. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

Therefore, the line of state cases that prevents these individuals from full recovery is rejected. It is contrary to Supreme Court and Second Circuit precedent. *See National Labor Relations Brd. v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969) (holding that the NLRB "is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers."); *Bagel Bakers Council of Greater New York v. NLRB*, 55 F.2d 304 (2d Cir. 1977) (holding that costs should not be shifted "from the employers to the employees harmed by illegal conduct").

d. Failure to Pursue Federal Claim

The court agrees that due process analysis requires a consideration of all remedies available to a plaintiff. *See Polk v. Kramasky*, 711 F.2d 505, 508 (1983) ("[T]he 'process' available to plaintiff . . . must taken to include the full remedial scheme, including the availability of the federal EEOC and the federal court."). Therefore, the categories of plaintiffs-intervenors who may sue defendants for damages must be limited to those who endeavored to take advantage of any claims that they may have been able to make under federal law.

Of course this directive is limited by the availability of a federal counterpart to the claim that the plaintiffs-intervenors made under the Human Rights Law. For example, no federal law protects individual from discrimination because of their "genetic predisposition." N.Y. Exec. Law § 296(1). Nor is there a federal counterpart to the Human Rights Law that protects individuals who are younger than

40 years of age. N.Y. Exec. Law § 296(3-a)(a) and (b). Thus, individuals who brought claims under the Human Rights Law on these bases would not be affected by this requirement. By contrast, to the extent that the claims and remedies for sex or race discrimination are the same under federal and state law, individuals who brought sex or race discrimination claims under the Human Rights Law must also have endeavored to bring suit under federal law in order to sue defendants for damages.

In summary, to the extent that a counterpart existed in federal law for any claim brought under the Human Right Law by the categories of plaintiffs-intervenors delineated *supra*, page 11, and 1) plaintiff-intervenor successfully brought the federal claim, or 2) plaintiff-intervenor did not attempt to avail himself of the federal claim, he cannot sue the defendants in their individual capacities. Such individuals have not been prejudiced by the Division's conduct.

If plaintiffs-intervenors ultimately prevail on their claims at trial, it will be left to the parties to formulate a methodology for determining to which class members this restriction may apply. In the event that this point is reached, disagreements as to which Human Right Laws have federal counterparts will be brought before and settled by the court.

III. Absolute Legislative Immunity

In response to plaintiffs-intervenors' claims against defendant Mercado for "promulgating and implementing" allegedly unconstitutional intake rules, (NOW Cmplt. at ¶¶ 28, 47), the defendants argue that Mercado is entitled to

absolute legislative immunity from these claims. (Defs., Mem. of Law at 16).

The parties agree that it is clear that Mercado cannot be held liable for the promulgation of a rule or regulation. *See Bogan v. Scott-Harris*, 118 S.Ct. 966, 972 (1998) ("Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.' "); *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 731 (1980); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 (1979). They differ on whether Mercado's actions with respect to the Division's procedures and policies are and were legislative in nature. (Defs.' Mem. of Law at 17-18; Plfs.' Mem. of Law at 45-49).

Based on the record in this case, the court is not convinced that Mercado's actions were limited to legislative functions. He appears to have been involved not only in the promulgation of these rules, but in their administration. (Seegars Cmplt. at ¶¶ 31-32; NOW Cmplt. at ¶¶ 32-33, 46-47, 50-53). Therefore, Mercado is not entitled to absolute immunity from suit. *See e.g. Forrester v. White*, 484 U.S. 219, 225 (1988) ("[T]he highest executive officials in the States [are not] protected by absolute immunity under federal law."); *Scheur v. Rhodes*, 416 U.S. 232, 239-43 (1973).

IV. Conclusion

For the reasons stated above, defendants' motion to dismiss on grounds of qualified immunity is granted as to the plaintiff-intervenors described *supra*, page 9, and denied

as to the plaintiff-intervenors described *supra* page 11, as modified by the requirement that they must have sought to avail themselves of federal rights, to the extent that a federal counterpart was available. Defendant Mercado's absolute legislative immunity motion also is denied.

IT IS SO ORDERED.

Dated: New York, New York
July 24, 1998

s/ Robert L. Carter
Robert L. Carter
U.S.D.J.

APPENDIX D — ENDORSEMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 2, 1998

93 Civ. 7146 (RLC)

New York State Nat'l Org. for Women et al.

— against —

Cuomo

ENDORSEMENT

I. Background

The background of this case is discussed in detail in prior opinions of this court, *New York State Nat'l Org. for Women v. Cuomo*, No. 93 Civ. 7146, 1998 WL 422180 (S.D.N.Y. July 24, 1998) (Carter, J); *Cuomo*, 1998 WL 157029 (S.D.N.Y. Apr. 3, 1998) (Carter, J.), with which familiarity is assumed.

In response to the court's opinion of July 24, 1998 granting defendants' qualified immunity in part to plaintiffs-intervenors' damage claims, the plaintiffs-intervenors now seek reconsideration or clarification of the decision, pursuant to Rule 59(e), F.R. Civ. P.

The defendants have filed a cross-motion in opposition to plaintiffs-intervenors' motion for reconsideration or clarification, and additionally, also seek reargument and/or reconsideration of the decision in part, pursuant to Rule 59(e), F.R. Civ. P. and Local Civil Rule 6.3.[1]

1. Local Civil Rule 6.3 formerly was known as Local Civil Rule 3(j).

Appendix D

II. Standard of Review

In order to prevail on a motion to amend or for reconsideration of the judgment under Rule 59(e), F.R. Civ. P., the plaintiffs-intervenors' and/or defendants must show that the court overlooked controlling decisions or data that might have altered the outcome of the original disposition of the case. *Shrader v. CSX Transp. Inc.*, 70 F.3d 255, 257 (2d Cir. 1995).

Grounds for relief under Rule 59(e) are "equivalent to the grounds for relief on a motion for reconsideration under Local Civil Rule 6.3." *Farkas v. Ellis*, 783 F. Supp. 830, 832-33 n.1 (S.D.N.Y. 1992) (Conner, J.). A motion to reconsider made pursuant to Local Rule 6.3 is not a motion "to reargue those issues already considered when a party does not like the way the original motion was resolved." *In re Houbigant, Inc.*, 914 F.Supp. 997, 1001 (S.D.N.Y. 1996) (Sweet, J.). Rather, a successful motion for reconsideration under Local Rule 6.3 will bring to the court's attention "matters . . . that might reasonably be expected to alter the conclusions reached by the court." *Shrader*, 70 F.3d at 257.

III. Discussion

A. Plaintiffs-Intervenors' Motion

Plaintiffs-intervenors seek clarification of section II.B.1.b of the court's July 24, 1998 opinion, in which the court ruled that complainants whose cases were dismissed by the State Division of Human Rights ("SDHR" or the "Division") for "failure to locate" cannot seek damages

against defendants. They argue that this aspect of the opinion is subject to two inconsistent interpretations: 1) that the court only has barred from pursuing damage claims those complainants whose uncooperative conduct caused the dismissal of their cases or 2) that each and every person whose case was dismissed for failure to cooperate is barred from pursuing damage claims against the defendants. Plaintiffs ask that the court clarify the opinion to reflect that complainants may pursue damage claims if they can show that in fact their cases were not dismissed due to their own failure to cooperate, but resulted from arbitrary SDHR practices or policies. (Plfs.-Intvns.' Mem. of Law at 2-3).

According to plaintiffs-intervenors, proof that dismissals for failure to locate were due to actions of the SDHR rather than of plaintiffs-intervenors would include the following: a) evidence that the Division dismissed complaints after sending letters to complainants that did not advise them that the complaints would be dismissed unless they failed to take certain actions; b) evidence that the Division cannot adequately explain the rationale for such ambiguous or misleading letters; and c) evidence that the Division recognized the unfairness of continuing to dismiss cases for failure to cooperate in the manner that this code was used prior to September of 1995. *Id.* at 5-6.

After reviewing plaintiffs-intervenors' motion papers, the court concludes that section II.B.1.b of its July 24, 1998 opinion does need clarification. The court clarifies the opinion in the following way. To the extent that plaintiffs-intervenors are able to proffer evidence demonstrating that arbitrary policies or practices of the Division rather than

complainants' own unresponsiveness resulted in dismissal of their cases for failure to cooperate, plaintiffs-intervenors are not barred from pursuing damage claims against defendants.

This clarification is consistent with the court's reasoning in section II.B.2 of the July 24, 1998 opinion concerning cases to which the standard enunciated in *Polk v. Kramasky*, 711 F.2d 505 (2d Cir.), *cert. denied*, 464 U.S. 100 (1983), does not apply. Like the other categories of complainants discussed in this section, complainants whose cases may have been dismissed for failure to cooperate due to the Division's arbitrary policies or practices may have been prejudiced by the SDHR's actions and may be entitled to damages from the defendants. *See NOW*, 1998 WL 422180 at *5-12.

B. Defendants' Motion

The court finds the defendants' motion for reconsideration and reargument unconvincing because they have failed to set forth any "controlling authority" that the court overlooked that would bar the court's July 24, 1998 decision denying in part defendants' ability to assert a qualified immunity defense to plaintiffs-intervenors' damage claims. Rather, defendants have restated their disagreement with the court's interpretation of the applicable law, principally *Polk*, 711 F.2d 505, and *Logan v. Zimmerman*, 455 U.S. 422 (1982). (Defs.' Mem. of Law at 5-9, 12-15; Defs.' Reply Mem. of Law at 1-4).

Because motions made pursuant to Rule 59(e), F.R. Civ. P. and/or Local Civil Rule 6.3 are not opportunities "to

reargue those issues already considered when a party does not like the way the original motion was resolved," *In re Houbigant, Inc.*, 914 F.Supp. at 1001, defendants' arguments are unavailing. Therefore, defendants' cross-motion is denied.

IT IS SO ORDERED.

Dated: New York, New York
September 2, 1998

s/ Robert L. Carter
Robert L. Carter
U.S.D.J.

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 3, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 7146 (RLC)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al., on behalf of themselves, their members, and all others similarly situated, and CLARICE SEEGARS, JANE DOE, DELLIE BRITT and BERNADETTE THOMAS, on behalf of themselves, and all others similarly situated,

Plaintiff-Intervenors,

– against –

MARIO CUOMO, individually and as former Governor of the State of New York, MARGARITA ROSA, individually and as former Commissioner of the Division of Human Rights of the Executive Department of New York State, GEORGE PATAKI, individually and as Governor of the State of New York, and EDWARD MERCADO, individually and as Commissioner of the Division of Human Rights of the Executive Department of New York State,

Defendants.

OPINION

* * *

Appendix E

ROBERT L. CARTER, District Judge

This action arises out of alleged constitutional violations committed by the New York State Division of Human Rights ("SDHR" or the "Division") through its failure to process discrimination complaints in a timely manner. Plaintiffs, including members of the New York State National Organization for Women ("NOW"), and individual plaintiff-intervenors, now move to amend their complaint[1] pursuant to Rule 15(a), F. R. Civ. P., to add additional parties in their individual capacities and to create an additional subclass of plaintiffs.[2]

NOW separately argues that new intake procedures promulgated by SDHR in November 1995 impermissibly restrict the filing of complaints and are unconstitutional. NOW seeks to supplement its complaint pursuant to Rule 15(d), F. R. Civ. P., by adding various constitutional claims against the Division related to its new intake procedures and by adding the Division's Commissioner as a party in his personal capacity for promulgating these procedures. NOW further seeks a preliminary injunction enjoining the Commissioner from enforcing portions of the new procedures.

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1. The individual plaintiff-intervenors filed separate claims but seek to amend the complaint on the same grounds as NOW. Therefore, except where otherwise noted, the claims will be treated as one.

2. Defendants cross-moved to dismiss one of the individual plaintiff-intervenors but the motion was denied by Magistrate Judge James C. Francis, IV. Defendants do not contest this denial. (Defs.' Objs. at 2, fn. 1).

Appendix E

I. Background

In their original intervenor complaint filed in August 1994, plaintiffs alleged that SDHR's inordinate delay in processing discrimination complaints deprived the complainants of their due process and equal protection rights. According to the complaint, New York Executive Law § 297 (the "Human Rights Law") provides an administrative process for resolving complaints of discriminatory practices within specific time periods. Plaintiffs asserted that SDHR failed to adhere to these time limitations, as a consequence of which: complainants were unable to obtain needed evidence, could not provide accurate testimony, could no longer locate witnesses, or had awards reduced or cases dismissed in state court. In addition, the Division's caseload became severely backlogged, compounding its inability to process outstanding complaints.

In his Report and Recommendation, dated May 19, 1995 (the "Initial Report"), Magistrate Judge James C. Francis, IV found that plaintiffs had sufficiently established that the Human Rights Law creates an entitlement to have discrimination complaints heard without prejudicial delay, thereby providing complainants with a property right protected by the Fourteenth Amendment. (Initial Report at 45). The Initial Report further recommended the substitution of Edward Mercado, Commissioner of SDHR, and Governor George Pataki as defendants in their official capacity to the extent that their predecessors, Margarita Rosa and Mario Cuomo, respectively, were sued in their official capacity. (Id. at 30-35). Upon motion of NOW and individual plaintiff-intervenors, a class was provisionally certified, as follows:

> of all persons who have filed or will file complaints of discrimination with SDHR and whose complaints have not been finally administratively adjudicated or otherwise resolved within three years of the date of the filing of the complaint.
>
> This class includes, but is not limited to, two subclasses as follows:
>
> (a) all persons who have been, are or may be subject to dismissal of their complaints because defendant Margarita Rosa, SDHR Commissioner, has taken longer than three years from the date the complaint was filed to finally resolve the complaint; and
>
> (b) all persons who have been, are or may be subject to a reduction in the monetary relief awarded, either by order of Commissioner Rosa or by court order, because it has taken longer than three years from the date the complaint was filed to render a final administrative determination.

(Id. at 53).

Plaintiffs subsequently moved to amend and supplement the complaint based upon recent events and discovery that has occurred since the Initial Report. According to NOW, Commissioner Mercado and Governor Pataki know of the Division's substantial case backlog and are aware of the alleged constitutional violations resulting therefrom, yet have

failed to remedy this problem. Furthermore, NOW claims that the SDHR has attempted to reduce its case backlog under the Pataki administration's and Commissioner Mercado's auspices by 1) promulgating and implementing new Rules of Practice ("Rules") that prevent certain individuals from filing discrimination complaints that are otherwise permitted to be filed under the Human Rights Law,[3] and 2) dismissing hundreds of complaints per year on the grounds of "administrative convenience," i.e., where the Division has taken so long to contact the complainant that it either cannot locate the complainant or determines that the complainant is uncooperative.[4]

Plaintiffs now seek leave to amend the complaint to add claims against the Governor and the Commissioner in their

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3. Under the old Rules, SDHR was required to investigate all complaints within its jurisdiction and within the one-year statute of limitations. (Tr. at 206). The new Rules require that a complaint contain "information sufficient to indicate that the individual or organization filing such verified document has been aggrieved by an unlawful discriminatory practice and has actual knowledge of the facts alleged." 9 N.Y.C.R.R. § 465.1(1). In addition, the Division need not accept a complaint if it is based on "mere speculation," "contradicts an inference of discrimination," or is "totally unbelievable on its face." 9 N.Y.C.R.R. § 465.3(c)(6).

4. SDHR's definition of "administrative convenience" apparently encompasses a larger range of meanings than NOW targeted in its complaint. In accordance with the meaning used by plaintiffs in their motions, this opinion will use the narrow characterization of an "administrative convenience" dismissal as an instance in which SDHR could not locate the complainant or deemed the complainant uncooperative.

personal capacities (they are already defendants in their official capacities) because of their alleged failure to take reasonable steps since January 1995, to effectively and fairly reduce the Division's case backlog. Plaintiffs also seek leave to amend to add a third subclass to the definition of the provisionally certified class, namely, complainants whose complaints have been dismissed for administrative convenience. NOW separately seeks to supplement the complaint to add claims against Commissioner Mercado, in his personal capacity, and with respect to seeking injunctive relief against the Commissioner to prevent his implementation of those portions of the current Rules (9 N.Y.C.R.R. §§ 465.1(1) and 465.3(c)(6)) that relate to the filing and acceptance of a discrimination complaint with SDHR.

After conducting a hearing on these matters, Magistrate Judge Francis issued a Report and Recommendation, dated June 17, 1997 (the "Report"), in which he concluded that plaintiffs should be granted leave to amend their complaint to add the Governor and the Commissioner in their individual capacities. The magistrate judge determined that defendants had failed to demonstrate that plaintiffs' delay in bringing the motion was unreasonable, in bad faith, or prejudicial to defendants. (Report at 9, 10). In addition, the magistrate judge relied on his earlier reasoning in the Initial Report which found that, since the Governor and Commissioner have the power to direct policy at SDHR:

> if the Governor and Commissioner knew of the alleged constitutional violations described in the original complaint but failed to remedy them

> properly, they can be held liable in their individual capacities, regardless of their financial control over SDHR.

(Initial Report at 11, 12).

The Report also recommended that plaintiffs be allowed to add a third subclass to the definition of the provisionally certified class, concluding that NOW had sufficient standing to adequately represent the proposed subclass regardless of whether a specific plaintiff-intervenor is a member of the proposed subclass. (Id. at 12, 13). Quoting the Initial Report, Magistrate Judge Francis found that:

> [I]t is sufficient [for purposes of representational standing] for NOW to allege that its members' property rights are threatened by the SDHR's purported inability to process claims properly." (Initial Report at 24). Therefore, NOW has standing to assert claims on behalf of those complainants subject to administrative convenience dismissals.

(Report at 12, 13).

The Report further recommended that NOW's motion seeking to supplement its complaint be granted to add claims against the Commissioner in his personal capacity for implementing the new intake procedures. The magistrate judge found that this claim "relate[d] to the issues raised in the original pleading," and that defendants had not demonstrated that the claim would "require the [defendants]

to: (i) expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the [party] from bringing a timely action in another jurisdiction." (Id. at 19, 20, citing *Block v. First Blood Assoc.*, 988 F.2d 344, 350 (2d Cir. 1993)). The magistrate judge concluded that the Commissioner[5] should be enjoined during the pendency of this action from using the new Rules as a basis for making any determinations in processing discrimination claims. (Report at 43).

Defendants filed limited objections to the Report pursuant to Rule 72, F. R. Civ. P., charging that the proposed amendments are futile and improperly substantiated, and that the amendments will only delay the course of this litigation and prejudice the defendants. Plaintiffs' reply memorandum of law rejects defendants arguments in full.

Subsequent to filing a reply to defendants' objections to the Magistrate Judge Francis' recommendations, NOW filed a motion pursuant to Rule 65(a)(2), F. R. Civ. P., for an order 1) consolidating the proceeding on NOW's preliminary injunction motion with a trial on the merits, and converting the magistrate judge's recommendation to grant the preliminary injunction into a permanent injunction enjoining defendant Mercado, and all persons in active concert with him, from implementing the new Rules, 2) providing notice to defendant Mercado of the court's intention to consolidate

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5. The Report identified the Division as the entity to be enjoined, rather than the Commissioner, but the Commissioner is the named party, not the Division. Accordingly, the court interprets the magistrate judge's recommendation for injunction to apply to the Commissioner.

and convert the proceeding and offering him the opportunity to submit an offer of proof in support of any contention that he might make that there are additional facts which would, if heard by the court, result in a different result, and 3) granting NOW 30 days, from the date of the court's decision to enter a permanent injunction, to submit a proposed order providing remedial relief to all persons claiming to be aggrieved by unlawful discriminatory practices who attempted to file a complaint at the Division and whose complaint, or efforts to file a complaint, were rejected by the Division since November 5, 1995.

II. Analysis

When a magistrate judge enters into the record a recommendation for disposition of a matter, a district court is required to make "a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule." Rule 72, F. R. Civ. P. The district judge "may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions." Rule 72(b), F. R. Civ. P.

A. Motion to Amend

In the Report, the magistrate judge recommends granting plaintiffs' motion to amend the complaint to add Pataki and Mercado in their personal capacities and to add a third subclass. The proposed sub-class is defined as:

Appendix E

All persons who have been, are, or may be subject to administrative convenience dismissals because SDHR was either unable to locate complainants, or SDHR determined that the complaint had failed to cooperate and such complaints had been pending at SDHR from more than one year.

Leave to amend a motion "shall be freely given when justice so requires." Rule 15(a), F. R. Civ. P. Provided the claims are a proper subject for relief, a plaintiff ought to be afforded an opportunity to test his claims on the merits. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Thus, absent undue delay, bad faith, failure to cure deficiencies by amendments previously allowed, futility of the amendment or undue prejudice to the opposing party in allowing the amendment, leave to amend should be granted. *Id.*

Defendants do not allege that the motion to amend the complaint is legally frivolous or that granting it would result in unjustified delay or undue prejudice. Instead, in an attempt to refute plaintiffs' claim that the Governor and Commissioner stood idle as SDHR's caseload languished, defendants argue that plaintiff's motion cannot stand in the face of evidence that the SDHR's case backlog has been significantly reduced since January 1995. (Defs.' Objs. at 10-12). The defendants further allege that the Governor and Commissioner reduced the backlog without recourse to the new Rules. (Id.). These arguments, however, go to the merits of the defendants' case and are inadequate to prevent a motion to amend. *See Madison Fund, Inc. v. Denison Mines Ltd.*, 90 F.R.D. 89, 91 (S.D.N.Y. 1981) (Duffy, J.) (holding that considering an amendment is not the time to address the merits of a case).

Appendix E

Defendants also argue that NOW cannot represent the proposed subclass on the grounds that NOW should be restricted to representing female plaintiffs; that some complainants that fall within the proposed subclass had complaints dismissed before Pataki and Mercado were in office; and that some of the administrative convenience dismissals ("ACDs") were the result of the complainants not staying in contact with the SDHR. (Defs.' Objs. at 12-15). Defendants further fault the magistrate judge for not ruling on the individual plaintiff-intervenors' ability to represent the interest of the proposed subclass, claiming that no individual plaintiff-intervenor could adequately represent the subclass. (Id.)

The court finds that defendants waived their right to object to NOW's ability to represent men in the proposed subclass when defendants failed to contest the magistrate judge's Initial Report which found NOW capable of being a class representative for men and women (though it could only sue for women). (Initial Report at 26, 27). Such inaction constitutes a waiver of further objection in regards to this issue. *See Small v. Secretary of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (holding that "failure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision"). The court's decision may not be changed or altered absent compelling or cogent reasons. *Badden v. Koch*, 799 F.2d 825, 828 (2d Cir. 1986). Defendants proffered no such rationale.

Defendants' assertions that some ACDs occurred before Pataki or Mercado came into office are irrelevant. The affidavit of John Lind, deputy commissioner of SDHR, reveals that from April 1996 through February 1997, there

were 434 ACDs.[6] This information adequately supports not only the approval of the proposed third subclass, but also plaintiffs' allegations of personal liability against the Governor and Commissioner. The fact that some ACDs took place under Pataki and Mercado's watch allows such dismissals to be "laid at the door of the Governor and the Commissioner." (Defs.' Objs. at 13). Whether these dismissals offend constitutional principles and whether any fault lies with complainants for breaking contact with SDHR are issues that go to the merits of the case and will be decided at trial.

The court also agrees with the magistrate judge's finding that NOW's standing to assert claims on behalf of the proposed third subclass obviates the need for the individual plaintiff-intervenors to be members of the subclass. (Report at 13, fn. 6). Even if such membership were required, the record indicates that individually named plaintiffs can adequately represent the proposed third subclass. The proposed subclass includes those persons who "may be subject to administrative convenience dismissals because SDHR was . . . . unable to locate complainants . . . . and such complaints had been pending at SDHR from more than one year." Two individually named plaintiffs, Dellie Britt and Clarice Seegars, have had cases pending with the SDHR for more than one year and may be subject to ACD determinations.[7]

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6. 129 of these 434 ACDs allegedly were due to the Division's failure to locate complainants or for claimed lack of cooperation. (Pl.-Ints.' Reply Mem. at 15, fn. 11).

7. Indeed, Britt allegedly was already threatened with case dismissal because the Division claimed it had been unable to locate him. *See* Reply Affirmation of Robert F. Graziano dated March 25, 1997, Exhibit "A".

Thus, Britt and Seegars are representative of the proposed subclass. Accordingly, the magistrate judge's recommendation to grant plaintiffs' motion to amend the complaint to add Pataki and Mercado in their personal capacities and to add a third subclass is affirmed and adopted as the judgment of this court.

B. Motion to Supplement

The Report recommends granting NOW's motion to supplement its complaint by holding Mercado liable in his personal capacity for the promulgation of the new Rules and by adding due process, equal protection, Supremacy Clause, and void for vagueness claims arising out of the Division's implementation of the new Rules.

As with Rule 15(a), F. R. Civ. P., a court has discretion to grant or deny a Rule 15(d) motion, *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir. 1995), in order to better foster "a full adjudication of the merits of the parties' disputes within a single comprehensive proceeding." *Katzman v. Sessions*, 156 F.R.D. 35, 38 (E.D.N.Y. 1994). The standard for the exercise of discretion on a motion to supplement the pleadings is the same as that for disposition of a motion to amend a complaint under Rule 15(a), F. R. Civ. P. *Id.*

Defendants argue that NOW's motion must be denied as barred by the Eleventh Amendment and the principles of comity and federalism.[8] Defendants argue primarily that the

8. Defendants also argue that the individual plaintiff-intervenors lack standing to challenge rules because their complaints were

(Cont'd)

Eleventh Amendment protects Mercado from any finding of liability for promulgating new rules when acting in his official capacity under state law. (Defs.' Objs. at 15, 16). Defendants also claim that allowing NOW to bring a separate claim on behalf of the entire class would result in the bifurcation of claims and would be confusing and prejudicial to defendants. (Id. at 18, 19).

The magistrate judge already ruled on the Eleventh Amendment arguments now raised by defendants in his Initial Report when he found that state actors could be sued in their individual capacities if they have personal involvement and actual or constructive knowledge of the alleged constitutional violations (Initial Report at 39-40). The case law cited by defendants, *Farid v. Smith*, 850 F.2d 917 (2d Cir. 1988), is, in fact, the very case law cited by the magistrate judge in his Report that recommends granting NOW's motion. The court in *Farid* held that "[t]he Eleventh Amendment bars recovery against an employee who is sued in his official capacity, but does not protect him from his personal liability if he is sued in his 'individual' or 'personal' capacity." 850 F.2d at 921. Moreover, the Second Circuit held in *Farid* that even if a state official "was merely carrying out a policy of the state, he would not be protected from personal liability under the 11th Amendment." *Id.* Thus, defendants' argument that

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(Cont'd)
accepted under the former Rules. (Defs.' Objs. at 18, fn. 7). However, the individual plaintiff-intervenors' standing is a non-issue at this juncture since only NOW is seeking to supplement its complaint by adding Mercado in his personal capacity. Defendants additional arguments questioning the ability of NOW to perform as a class representative have already been addressed *supra* II.A.

Mercado was merely following the state legislature's orders is misplaced. State officials can be individually liable if they have direct power to control policies, *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1065-66 (2d Cir. 1989), and if they have actual or constructive knowledge of alleged constitutional violations. *Santiago v. Miles*, 774 F. Supp. 775, 791-92 (W.D.N.Y. 1991). As Commissioner of SDHR, Mercado had direct oversight of the implementation of the policies. Furthermore, he and his agency were put on notice of the alleged constitutional violations by the instant law suit which was instituted prior to Mercado's appointment. Therefore, plaintiffs may sue Commissioner Mercado in his personal capacity.

The fact that NOW is the only plaintiff seeking to supplement its complaint does not present a confusing melange of claims as the defendants suggest. Indeed, defendants fail to present any evidence or showing that allowing NOW to proceed on these claims would unduly confuse or prejudice these proceedings. On the contrary, the proposed supplemental claims concerning the new Rules are related to the original claim of undue delay in evaluating new cases, especially considering that the Rules were changed specifically to reduce the agency's case backlog. (Report at 18). Accordingly, Magistrate Judge Francis' recommendation to allow plaintiffs' motion to supplement the complaint is affirmed and adopted as the judgment of this court.

C. Motion to Enjoin

The Report recommends granting NOW's motion to enjoin Commissioner Mercado from implementing the new

Rules as they apply to accepting discrimination complaints. In reaching this decision, Magistrate Judge Francis first held NOW to the highest standard for the imposition of a mandatory preliminary injunction: a likelihood of success on the merits and proof of irreparable harm in the absence of such an injunction. *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). Neither defendants nor NOW contest the applicability of this standard.

The magistrate judge then evaluated NOW's probability of success on its claim under the balancing test set forth by the Supreme Court in *Mathews v. Eldrige*, 424 U.S. 319, 335 (1976). In *Mathews*, the Court held that the three factors used to determine the constitutionality of government administrative procedures are 1) the private interest that will be affected by the official action, 2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and 3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement could entail. *Id.* Applying the *Mathews* principles, Magistrate Judge Francis found that plaintiffs possessed a "substantial" likelihood of success based on his findings that 1) the ability to file a complaint with SDHR is a type of property interest protected by the Due Process Clause of the 14th Amendment, 2) the new Rules of Practice are ambiguously defined and randomly applied, thereby creating a significant risk that valid discrimination claims will be rejected by the SDHR, and 3) the Division failed to articulate any fiscal or administrative burden that would attend implementing substitute intake procedures. (Report at 37).

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Based on witnesses' testimony, Magistrate Judge Francis also found that the arbitrary denial of discrimination complaints irreparably harms the putative complainants, since they are unable to secure the protection of the Human Rights Law and are unlikely to pursue other available remedies. (Report at 40). In particular, Sheila Akabas, a professor at the Columbia University Graduate School of Social Work, and Karen Wagner, a senior extension associate at the Cornell University School of Industrial and Labor Relations, both testified that individuals whose complaints have been declined by a government agency will most likely not pursue their complaints elsewhere. (Tr. at 77-78, 141-142). The magistrate judge found that complainants who did refile their complaints faced the barriers of statutes of limitations, the increasing difficulty in obtaining evidence as time passes, and the retarding of efforts to obtain some forms of relief such as reinstatement to employment. (Report at 41). Finally, Magistrate Judge Francis relied on evidence adduced at the hearing that complaints of discrimination in violation of federal law which are rejected by the Division are in jeopardy of not being channeled to the Equal Employment Opportunity Commission ("EEOC") since some SDHR employees 1) discourage complainants from pursuing federal claims, 2) fail to adequately inform complainants of the EEOC's potential for filing complaints, and 3) fail to refer putative complainants to the EEOC altogether. (Record at 42). Thus, Magistrate Judge Francis concluded that SDHR's continued use of the new Rules risks inflicting irreparable harm on potential complainants by depriving them of their due process right to have their discrimination claims properly investigated. *See Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (alleged possible deprivation of a constitutional right

constitutes irreparable harm for purposes of a preliminary injunction) (citing *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984)). Since he also found substantial likelihood that NOW will succeed on the merits of its due process claim, the magistrate judge recommended granting the preliminary injunction to prevent the implementation of the new Rules in SDHR's complaint processing procedures.[9]

Defendants first object to the magistrate judge's reliance on the testimony of Akabas and Wagner in making his recommendations. Although defendants do not contest Wagner's and Akabas' credentials as experts on the substantive issue of sex discrimination,[10] defendants claim that, because of their limited direct knowledge of individuals who have attempted to file a complaint with the Division and been turned away, Akabas' and Wagner's testimony is not dispositive and should be discounted. (Defs.' Brief at 19, 22).

The Federal Rules of Evidence permit opinion testimony by experts when the witness is "qualified as an expert by knowledge, skill, experience, training, or education," and

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9. Since Magistrate Judge Francis found a preliminary injunction warranted on the basis of due process, the court did not address the question of whether a preliminary injunction should issue on the basis of NOW's equal protection and Supremacy Clause claims.

10. Both Wagner and Akabas have received significant schooling in this area, published numerous articles on the subject of discrimination in the workplace, and conducted extensive training programs for students, employers, unions, and public agencies. (*See* Wagner: Tr. 61-73; Akabas: Tr. 125-37).

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"[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine the fact in issue." Rule 702, Fed. R. Evid. Both Wagner and Akabas clearly are qualified experts in their fields and their testimony was adequately geared towards assisting the trier of fact reach a conclusion about the level of harm inflicted by SDHR's initial rejection of a complaint. Defendants challenge the testimony in question, however, by arguing that Akabas and Wagner are not qualified "to speak to the issue of the adequacy of the new intake procedure" (Defs.' Objs. at 19, 20), in violation of Rule 703, Fed. R. Evid., which delimits the bases upon which an expert may rely in testifying to those "reasonably relied upon by experts in the field." Defendants' objections stem from the fact that Wagner did not interview any individual who failed to pursue other remedies after having his complaint rejected by SDHR under the new Rules and Akabas knew of only one such person. (Tr. at 148).

If Wagner and Akabas were testifying directly to the adequacy of the intake procedures, Rule 703 could very well prevent their testimony from being heard by the trier of fact. However, they each testified only to the likelihood that a person whose complaint has been rejected would pursue his complaint elsewhere. In that regard, both Wagner and Akabas have ample experience with labor disputes involving alleged discrimination and the tensions involved in pursuing discrimination claims. For example, Akabas testified in the following manner:

> Q: How would you describe the mental and emotional state of someone who believes that

they have been subjected to unlawful discrimination?

A: Well, there's a range of responses, but my experience is that most of the time people feel helpless. They feel that there are [sic] not much in the way of supports for them. They feel victimized. They feel that the possibility of reversing the experience is small. And they feel that way based on prior experience where they have had similar experiences or having observed other people who have had similar experiences.

. . .

Q: Let's assume that a person believes that he or she is a victim of discrimination in the workplace and does come forward to make that discrimination complaint. Let's further assume that an employee of a government agency rejects that complaint, doesn't let it be filed. What is your opinion of the likelihood of that person pursuing the complaint any further:

. . .

A: I would say that some might have gotten enough energy together that they could proceed afterward, but the vast majority would have reconfirmation of their

expectation that no one's going to listen, and I'm just going to have to live with this — a repeat of the learned helplessness of victims.

(Tr. at 138, 141-142).

Wagner's testimony included:

Q: . . . Let's assume that a woman believes that she is the victim of discrimination in the workplace, and she does come forward to make a discrimination complaint to a government agency. Let's further assume that an employee of that agency tells the woman that the agency will not accept the complaint. What is your opinion of the likelihood of that woman pursuing the complaint any further?

A: There's a high unlikelihood that she would pursue that complaint further.

Q: That is a high unlikely [sic] that she would pursue it?

A: It is unlikely that she would pursue that complaint further.

Q: What is the basis for that opinion?

A: A number of reasons form the basis of that opinion.

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> In the general training and education that I did in my role at Working Woman's Institute in working with individuals who were the target of behavior they perceived to be harassing, many of them were poor or working class women, or even middle class women who did not have the money to seek other legal representation, and so they relied on a government agency whose mission they understood was to protect and to address issues of discrimination. And so the lack of economic resources would be one strong factor that would discourage women from pursuing this.
>
> For poor, working class, and immigrant women, their access to any other information about what other options exist is also limited by their lack of economic resources, and so they would see that as their only avenue of redress, and if that was shut off to them, then they would see that they had no avenue of redress.

(Tr. 77-78).

Wagner further testified on cross-examination that her "opinion here today is based on [her] experience in counseling women and in working with women and in understanding the literature." (Tr. at 81).

Akabas' and Wagner's testimony about the effects of discrimination sufficiently supports the magistrate judge's

opinion that complainants, once rejected by SDHR, most likely will not seek redress elsewhere. Therefore, based on their testimony and on their credentials, Wagner's and Akabas' opinions as to the effects of the governments' initial rejection of discrimination complaints are not "pure speculation" as averred by defendants and their testimony is not excludable under either Rule 702 or 703, Fed. R. Evid.

Defendants also object to testimony concerning the impact of SDHR's new Rules given by Lois Shapiro-Canter, President of New York State NOW. Defendants characterize Shapiro-Canter's testimony as "ineffective" since she "was not familiar with any changes in procedure .... [and] did not know of any person with putative claims of discrimination referred by NOW personnel to the Division whose complaints were not accepted by the Division under the new Rules." (Defs.' Objs. at 23). However, Shapiro-Canter was not presented as an expert witness and the magistrate judge was free to give as much credence to her testimony as he felt it warranted. Therefore, defendant's objection to her testimony is unfounded.

Defendants next argue that the discretion exercised by the Division's employees under the new Rules of Practice is justified because it protects against "vexatious and unnecessary governmental investigation." (Defs.' Objs. at 24). Under the new Rules, Division intake personnel may reject complaints which are based on "mere speculation," or are contradictory, "totally unbelievable," or jurisdictionally insufficient. (Report at 26). Supervisors review any decision to decline complaints before the rejection becomes official. Defendants argue that the protection of SDHR's resources

that this review system provides "should be sufficient to prevent the Division's new intake procedures from being struck down by the federal court." (Defs.' Objs. at 24).

Identifying and dismissing frivolous complaints are justifiable and desirable goals. SDHR does not have limitless resources and even plaintiffs' witnesses admit that not all claims have merit (Tr. at 82, 152). However, the primary issue facing the court is whether SDHR's methods of separating "vexatious" claims from valid ones are constitutional. Ample evidence in the record suggests that New York's government, in its rush to cleanse the Division's backlog of cases and prevent wasteful investigations, has instituted ambiguous policies that are erratically applied and that unduly risk erroneous determinations in the intake process.

For example, Lind testified that the Division had "some difficulties in consistency across the state" when applying the standard operating procedures for accepting complaints. (Tr. at 221). In monitoring the nine regional offices and two special units (Tr. at 270), Lind found that "[t]here were inconsistencies in language and in approach." (Tr. at 221). As Magistrate Judge Francis noted, the following exchange highlights the new Rules lack of clarity:

> Q: . . . Now, Mr. Lind, do the new rules or revised rules of practice now define the term complaint as requiring that a complainant have, quote, actual knowledge, unquote, of the facts being alleged?
>
> A: Um hmm.

Q: Okay. And what do the regs mean by actual knowledge?

A: Well, I mean, I think it means what the words say, that they have actual knowledge.

Q: Well, would you tell me what your understanding of actual knowledge as used in the regs is?

A: That they have knowledge that the discrimination complained of — they have actual knowledge of the discrimination complained of. I could answer that, I suppose, in the other way, to say that when someone has no facts to support— other than that they are a member of a protected class and that something has happened to them, but they have no other knowledge, that that is what that is intended to get at.

Q: Okay. Let me give you an example, and then let's see whether this meets the definition of a complaint or not. A woman comes to the State Division and contends or explains that although she was promoted along with a male colleague, she did not get a raise and he did, but she bases that statement that the male colleague received a raise on information that was told to her by a co-worker. Would that meet the standard of actual knowledge?

A: Sure.

Q: . . . Would you agree with me that she doesn't have firsthand knowledge of the fact that the male co-worker received a raise?

A: Correct.

Q: . . . Okay. Would you tell me, then, what in the regulation defining complaint tells an intake worker that in this case the complainant had actual knowledge of a critical element.

A: There's nothing in the — I mean, again it is a definition. I mean, it doesn't tell you — it defines something. You know the assumption is that we have people capable of applying the definition.

Q: Well, if the definition doesn't give advice or direction or guidance in this case, how do these people who have to apply the regulation and the definition know whether the facts that I've just related to you constitute actual knowledge or not?

A: Well, they have knowledge of the law. They have knowledge of the rules. They have their experience. And they have a review by a supervisor.

. . .

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Q: Have intake workers been given any more detailed instructions, written instructions, on the definition of actual knowledge as contained in the definition of complaint?

A: Written instructions? No.

The disturbing results of SDHR's new Rules were described by witnesses who testified at the hearing that their discrimination complaints were mishandled or unfairly rejected by SDHR. For example, Veronica Starr was terminated as a legal secretary after extended absences due to her pregnancy. Her SDHR complaint was denied, according to an internal SDHR form, because her employer was within its rights to fill her position for reasons of business necessity. (Tr. at 24-25, 39). The SDHR interviewer further told Starr that she had exceeded the number of days absent from work that she was permitted to take pursuant to the Family Medical Leave Act ("FMLA") and that her employer was not covered by the Human Rights Law because it employed too few people. (Tr. at 24, 25). The magistrate judge found the interviewer's analysis of Starr's case to be wholly incorrect. He first noted discrepancies in the record as to whether the Division considered part-time employees to be employees for purposes of establishing SDHR jurisdiction over an employer. (Report at 33). Magistrate Judge Francis also noted Lind's testimony that Starr's use of FMLA leave time was not a factor contradicting an inference of discrimination. (Tr. at 267). Even more troubling, the SDHR "interviewer accepted the employer's assertion that it had to replace Ms. Starr for business purposes, and treated such information as contradicting the clear inference of discrimination in that

case" instead of investigating the veracity of the employer's statement. (Record at 33, 34).

The testimony of Starr and other witnesses significantly undercuts defendants' arguments that the SDHR is streamlining the complaint intake process in a fair and efficient manner. In reality, SDHR's intake personnel, most of whom are not lawyers (Tr. at 254), are assigned with the task of making snap judgements regarding a complaint's viability without clearly articulated guidance and under the pressure of thousands of cases waiting to be decided. A review by one supervisor facing the same pressures cannot serve to correct a seriously flawed process.

Lastly, defendants fault the Report for not subscribing to Lind's view that requiring the acceptance of a complaint already accepted by the EEOC would result in "an administrative nightmare." (Defs.' Objs. at 25). However, in evaluating the state interest in maintaining the new Rules, Magistrate Judge Francis found that the defendants "do not explain why it would be administratively burdensome for the division to accept [complaints already filed with the EEOC] and then simply defer the investigations until either the EEOC completed its investigations or referred the complaints to SDHR." (Report at 35). The magistrate judge was also disturbed that "nothing in the Human Rights Law, the new Rules of Practice, or the Worksharing Agreement [with the EEOC] authorizes the Division to decline a complaint simply because the individual has already filed a complaint with the EEOC." (Report at 36).

In their objections, defendants proffer Lind's testimony indicating that complaints filed with the EEOC eventually

do reach SDHR under work-share agreements with EEOC. (Tr. at 227). Nevertheless, neither Kulwant Singh nor Paul Grant, two witnesses whose complaints were rejected by SDHR because of EEOC involvement, were ever informed that their complaints could be registered with EEOC and later deferred to SDHR. Furthermore, Division intake personnel discouraged Claudette Maynard, another complainant, from seeking help from the EEOC. (Tr. at 52-53). In other words, complainants who are rejected by SDHR also risk forgoing their federal civil rights claims. Therefore, defendants' "administrative nightmare" argument fails in the face of the constitutional nightmare experienced by complainants who have avenues of redress denied or obstructed.

In light of the record, the court agrees with the magistrate judge that, as it currently stands, SDHR's complaint intake policy arbitrarily prevents aggrieved individuals from filing discrimination complaints with SDHR. As the Supreme Court held in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434-35 (1982), "[a] system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated." Moreover, the alternative means of redress suggested by Lind, namely, consulting an attorney and suing in state court (Tr. at 245), are not always available to discrimination victims who are unfamiliar with the legal system or unable to afford legal counsel. In sum, the record demonstrates that NOW is likely to succeed on the merits of its claim and that complainants will suffer irreparable harm in the absence of preliminary injunctive relief. Accordingly, Magistrate Judge Francis' recommendation to issue a preliminary injunction enjoining Commissioner Mercado

from utilizing the new Rules in SDHR's complaint intake process during the pendency of this action is affirmed and adopted as the judgment of this court.

III. Conclusion

For the reasons stated above, plaintiffs' motion to amend their complaint is granted. NOW's motions to supplement its complaint and for a preliminary injunction are also granted.

A full bench trial on the merits will be held beginning on June 8, 1998, at 11:30 AM. The parties should plan accordingly.

IT IS SO ORDERED.

Dated: New York, New York
April 3, 1998

s/ Robert L. Carter
Robert L. Carter
U.S.D.J.

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 10, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

DC: SDNY
DC Docket: 93-cv-7146
DC Judge: Carter

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of September two thousand one.

Dkt #'s:
98-9040 (L)
98-9069 (XAP)
99-9409 (CON)
99-9430 (XAP)

New York State NOW, et al.,

Plaintiff-Intervenors-Appellees-Cross-Appellants,

v.

Pataki, et al.

Defendants-Appellants-Cross-Appellee.

Appendix F

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the plaintiffs-Intervenors-Appellees-Cross-Appellants, Jane Doe et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: s/ Arthur Heller
Arthur Heller
Administrative Attorney

APPENDIX G — CONSTITUTIONAL, STATUTORY AND REGULATION PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of . . . property, without due process of law.

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Pertinent Sections of Article 78 (N.Y. C.P.L.R. 7801-06) (McKinney's 2001) provide, in relevant part:

> 7801. Relief previously obtained by . . . mandamus . . . shall be obtained in a proceeding under this article.
>
> 7802. The only questions that may be raised in a proceeding under this article are:
>
> 1. whether the body or officer failed to perform a duty enjoined upon it by law.

Appendix G

Pertinent Sections of the New York State Human Rights Law, N.Y. Executive Law §§ 290 *et seq.* (McKinney's 2001) provide, in relevant part:

290.3 A division in the executive department is hereby created to . . . eliminate and prevent discrimination.

297.2.a After the filing of any complaint, the division shall promptly serve a copy thereof upon the respondent . . . and make prompt investigation in connection therewith. Within one hundred eighty days after a complaint is filed, the division shall determine . . . whether there is probable cause to believe that the person named in the complaint . . . has engaged . . . in an unlawful discriminatory practice.

297.4.a Within two hundred seventy days after a complaint is filed . . . the division shall cause to be issued and served a written notice . . . requiring the respondent or respondents to . . . appear at a public hearing before a hearing examiner . . . . The complainant and all parties shall be allowed to . . . cross examine witnesses.

297.4.c Within one hundred eighty days after the commencement of such hearing, a determination shall be made and an order served [by the commissioner].

Appendix G

Section 306.3 of the State Administrative Procedure Act (McKinney's 2001) provides in pertinent part:

> A party shall have the right of cross-examination.

Sections of Title 9, Part 465 of the New York Code of Rules and Regulations, 9 N.Y.C.R.R. § 465 *et seq.* provide in pertinent part:

> 465.12 Hearings
>
> (e) *Form and content of proof.* The administrative law judge, in conducting the hearing, should utilize any procedures consonant with due process to elicit evidence concerning the ultimate issues. The following guidelines shall govern.
>
> (1) Hearsay evidence is fully admissible.
>
> (3) Documentary evidence may be admitted without testamentary foundation, where reasonable.
>
> (5) Information from witnesses may be introduced in the form of affidavits, without oral examination and cross examination.
>
> (6) The parties shall not be denied the right to examine or cross examine a witness, where necessary and reasonable.
>
> (9) Written stipulations may be introduced in evidence if signed by the person sought

to be bound thereby or by that person's attorney-at-law. Oral stipulations may be made on the record at open hearing. The entire record may be in the form of a stipulation, submitted to the chief administrative law judge without the convening of a hearing before an administrative law judge.

(11) Where reasonable and convenient, the administrative law judge may permit the testimony of a witness to be taken by telephone, subject to the following conditions:

i. a person within the hearing room can testify that the voice of the witness is recognized, or identity can otherwise be established;

ii. the administrative law judge, reporter and respective attorneys can hear the questions and answers;

iii. the witness is placed under oath and testifies that he or she is not being coached by any other person.

(12) Where affidavits or other forms of proof are not sufficient, an administrative law judge may authorize a deposition to be taken on oral or written questions and shall

admit such deposition into evidence at a hearing in lieu of the personal appearance and testimony of the deponent at the hearing, subject to the following conditions:

i. All parties and counsel have been offered a reasonable opportunity to participate in the taking of the deposition and to cross-examine there at.

ii. The deponent is unable to come to a hearing for any reason of personal hardship.

iii. The deposition was taken before any person authorized to administer an oath in the place where the deposition is taken, and is either subscribed and sworn to by the deponent, or certified as accurate by the stenographer, or is taken in the form of a tape recording.

iv. The absence of cross-examination shall not be a bar to the admission of such deposition; provided, however, that if justice so requires, the deponent may be subject to further inquiry by additional deposition.

Appendix G

465.14 Subpoenas and subpoenas *duces tecum.*

(a) *Who may issue.*

(1) The commissioner, an administrative law judge, the division attorney, or other officer or employee of the division designated for this purpose by the commissioner, may issue subpoenas requiring a witness to appear and give sworn testimony whenever necessary to compel attendance.

(2) The commissioner, an administrative law judge, the division attorney, the deputy commissioner for regional affairs, regional director, or other officer or employee of the division designated for this purpose by the commissioner, may issue subpoenas *duces tecum* to require the production for examination of any books, payrolls, personnel records, correspondence, documents, papers or any other evidence relating to any matter under investigation or in question before the division.

(b) *When and where returnable.* Subpoenas *duces tecum*, issued by the designated division officers and employees, may be made returnable at any stage of any investigation or proceeding pending before the division. Documents, books and records required for a public hearing before an administrative law judge may be subpoenaed and made returnable prior to such hearing at such time and place stated in the subpoena

by the issuing officer, or made returnable before the designated division depository officer. Witness subpoenas shall be returnable only at public hearing.

(c) *Application for a subpoena.* Subpoenas and subpoena *duces tecum* may be issued by the designated division officers and employees upon the application of a party or a party's attorney.

(d) *Subpoenas by attorneys.* An attorney appearing for a party may issue subpoenas or subpoenas *duces tecum* returnable at a hearing before an administrative law judge. Subpoenas for the production of documents, books and records required for a public hearing before an administrative law judge may be made returnable prior to such hearing before the duly designated division depository officer, who shall hold the material produced pursuant to the subpoena for the administrative law judge.

(e) *Depository officer.* An officer or employee of the division's office of general counsel may be designated as a depository officer, who shall receive and hold documents, books and records subpoenaed prior to a public hearing or produced at said hearing and required for use during the period between the commencement of a public hearing and any adjourned date thereof. Such records shall be made available for inspection and copying during the ordinary business hours of the division, by appointment, and in accordance with section 2305(c) of the Civil Practice Law and Rules of New York State.

APPENDIX H — PAGE 40 OF DIVISION MANUAL FOR INVESTIGATION AND PROCESSING OF COMPLAINTS (1997)

[Omitted here but submitted separately as Lodging]

APPENDIX I — PAGES 8-10 OF PLAINTIFFS' EXPERT REPORT

[Omitted here but submitted separately as Lodging]

APPENDIX J — PAGE 4 OF EXHIBIT 3 TO PLAINTIFFS' EXPERT REPORT

[Omitted here but submitted separately as Lodging]

APPENDIX K — DHR STAFFING AND CASELOAD CHART

[Omitted here but submitted separately as Lodging]

APPENDIX L — DIVISION PREPARED CHARTS SHOWING BACKLOG BY YEAR

[Omitted here but submitted separately as Lodging]

APPENDIX M — DIVISION ADMINISTRATIVE CONVENIENCE DISMISSAL PRE-TERMINATION NOTICE TO PAMELA Y. CROCKETT

[Omitted here but submitted separately as Lodging]

APPENDIX N — DIVISION ADMINISTRATIVE CONVENIENCE DISMISSAL ORDER FOR PAMELA Y. CROCKETT

[Omitted here but submitted separately as Lodging]

APPENDIX O — DIVISION ADMINISTRATIVE CONVENIENCE DISMISSAL PRE-TERMINATION NOTICE TO RENEE ZULUETA

[Omitted here but submitted separately as Lodging]

APPENDIX P — DIVISION ADMINISTRATIVE CONVENIENCE DISMISSAL ORDER FOR RENEE ZULUETA

[Omitted here but submitted separately as Lodging]